

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of his right lower extremity due to his accepted employment injury thereby warranting a schedule award.

On appeal counsel contends that the report of the impartial medical examiner (IME) was not sufficiently detailed and not correlated with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ to constitute the special weight of the medical opinion evidence. He requested clarification from a second impartial medical examination.

FACTUAL HISTORY

This case has previously been before the Board. The facts outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 18, 2003 appellant, then a 61-year-old clerk filed a traumatic injury claim (Form CA-1) alleging that he injured his back while lifting a parcel in the performance of duty on April 18, 2003. OWCP accepted his claim for aggravation of sciatic nerve on June 12, 2003. A magnetic resonance imaging (MRI) scan dated September 11, 2003 demonstrated a very mild grade I/IV anterolisthesis of L3 on L4 without lysis with bilateral facet degeneration and mild disc bulges from L3 to S1. Appellant had x-rays on December 14, 2006 which showed mild grade I/IV anterolisthesis of L3 on L4. He had a second MRI scan which found no gross interval change with no herniation or foraminal stenosis. On June 14, 2007 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing December 7, 2006 which OWCP accepted on September 13, 2007.

Appellant filed a schedule award claim (Form CA-7) on March 4, 2010. In support of his claim, he submitted a report dated February 2, 2009 from Dr. Arthur Becan, an orthopedic surgeon, who diagnosed chronic post-traumatic lumbar strain and sprain, herniated disc L3-4, anterolisthesis with spinal instability L4 over L5, discogenic disease of the lumbar spine and left lumbar radiculopathy. Dr. Becan evaluated appellant's right leg and found a class 1 moderate sensory deficit of the right L5 and S1 nerve roots (sciatic) with a default impairment of four percent. He found functional history modifiers of 3 and clinical studies modifiers of 3 to reach a net adjustment of 4 and a final right leg impairment of nine percent. In regard to appellant's motor strength deficit of the right quadriceps/extensor hallucis longus (sciatic), Dr. Becan found that the diagnosis had a default rating of nine percent for a class 1, mild IV/V deficit. He found functional history and clinical studies modifiers of 3 and a net adjustment of 4 to reach 13 percent permanent impairment of the right leg. Dr. Becan found a total of 21 percent right leg permanent impairment. He advised that appellant reached maximum medical improvement (MMI) on February 2, 2009.

OWCP referred appellant, a statement of accepted facts and a list of specific questions to Dr. Edward B. Krisiloff, a Board-certified second opinion orthopedic surgeon, to determine appellant's permanent impairment due to his accepted back injury. In a report dated June 30,

³ A.M.A., *Guides*, 6th ed. (2009).

2010, Dr. Krisiloff described his physical examination of appellant and noted that he found no hard neurologic findings. He noted, “The motor examination reveals some breakaway weakness that is likely secondary to pain and is not a true neurologic finding. The patient also complains of some decreased sensation, but a careful examination shows that it follows no anatomic dermatomal distribution and is therefore not a reliable finding. Dr. Krisiloff concluded, “He did not exhibit any hard neurologic findings in the lower extremities on my examination. Therefore, he has no permanent neurologic residuals as a result of his condition.”

On April 29, 2011 OWCP requested a supplemental report from Dr. Krisiloff. Dr. Krisiloff responded on June 14, 2011 and opined that appellant reached MMI in July 2003. He noted that appellant had continued issues with his lower back and left leg, but these were related to his underlying degenerative disc disease and not the employment injury of April 18, 2003. Dr. Krisiloff found that appellant had no objective neurologic deficits in the lower extremities and that the peripheral nerve impairment table for residual radiculopathy could not be used. He noted, “Left lower extremity impairment would therefore, be zero.”

In a report dated September 19, 2011, Dr. Becan reviewed Dr. Krisiloff’s report stating that it contained no hard neurologic findings, breakaway weakness and decreased sensation without anatomic dermatomal distribution. He noted that Dr. Krisiloff did not perform Semmes Weinstein Monofilament testing and that motor strength deficits were not graded. Dr. Becan reported that he found positive findings on examination on February 2, 2009.

By decision dated November 23, 2011, an OWCP hearing representative found that appellant had no permanent impairment of the left leg and remanded the case for additional development regarding any permanent impairment of appellant’s right leg.⁴

After further developing the claim with regard to the right lower extremity, OWCP issued an August 2, 2012 decision finding that appellant had no permanent impairment of his right leg due to his April 18, 2003 work injury. Counsel requested an oral hearing and, on February 19, 2013 an OWCP hearing representative affirmed the August 2, 2012 decision, finding that appellant had no right leg permanent impairment. Appellant appealed to the Board. The Board reviewed the February 19, 2013 decision and by decision dated December 24, 2013⁵ found that there was an unresolved conflict of medical opinion evidence between Drs. Becan and Krisiloff regarding the permanent impairment of appellant’s right leg. The Board remanded the case for referral to an IME to resolve the conflict.

In a letter dated December 30, 2013, counsel asked to participate in the selection of the IME. By decision dated January 2, 2014, OWCP denied appellant’s request to participate in the selection of the IME.

⁴ Appellant appealed the November 23, 2011 decision to the Board with respect to permanent impairment of the left lower extremity. The Board reviewed this decision on June 13, 2013 and affirmed the hearing representative’s decision that appellant had no permanent impairment of his left lower extremity.

⁵ Docket No. 13-1277 (issued December 24, 2013).

On March 27, 2014 OWCP referred appellant, a statement of accepted facts and a list of questions to Dr. Aaron Sporn, a Board-certified orthopedic surgeon for an impartial medical evaluation. Dr. Sporn completed a report on April 15, 2014 noting that he had reviewed the statement of accepted facts, appellant's medical records and performed a physical examination. He described appellant's history of low back injury. Appellant reported his current symptoms and noted that he had no radiating-type symptoms into his right leg. He noted that he stumbled when walking. On examination Dr. Sporn found that appellant's gait was normal, with mildly diminished range of motion in the thoracic and lumbar spines. He reported no trigger points, swelling, spasm, or clinically significant curves in the spine. Dr. Sporn noted that appellant's right lower extremity demonstrated range of motion within normal limits, with no signs of soft tissue swelling, tenderness, tendinitis, bursitis, ligamentous laxity, or nerve entrapment. He performed a peripheral neurological examination including motor strength testing, testing of reflexes, and test of sensation. Dr. Sporn noted that there were no muscle deficits of the right lower extremity and that sensation of the right lower extremity was intact with grade 1 reflexes. He diagnosed lumbar sprain and strain with left-sided lumbar radiculopathy symptoms. Dr. Sporn reviewed Dr. Becan's findings and conclusions regarding appellant's right leg. He noted that appellant reported no right lower extremity symptoms. Dr. Sporn noted that appellant had significant neurological deficits of the left lower extremity, but that neurological examination of appellant's right lower extremity was normal. He concluded that on a strictly objective basis appellant's examination demonstrated no abnormalities in the right leg attributable to appellant's accepted employment injury. Dr. Sporn noted, "There does not exist any disability or impairment of the right lower extremity that [is] causally related to the April 18, 2003 accident."

OWCP's medical adviser reviewed Dr. Sporn's report on May 8, 2014 and agreed with his findings of no permanent impairment of the right lower extremity as there were no objective findings of any neuropathy.

By decision dated June 5, 2014, OWCP denied appellant's claim for a schedule award due to permanent impairment of his right lower extremity. Counsel requested a review of the written record from OWCP's Branch of Hearings and Review on June 10, 2014.

OWCP's hearing representative issued a decision on November 20, 2014 finding that Dr. Sporn's report was entitled to the special weight of the medical evidence. He noted that Dr. Sporn based his report on a proper factual and medical background and provided complete findings on physical examination noting no objective findings and no basis for a rating due to permanent impairment of the right lower extremity. OWCP's hearing representative noted that there were no motor or sensory impairments that could be rated under the appropriate tables of the A.M.A., *Guides*. He affirmed OWCP's June 5, 2014 decision denying a schedule award. Appellant appealed to the Board. The Board reviewed the November 20, 2014 decision and by decision dated July 6, 2015⁶ found that Dr. Sporn's report adequately explained why appellant did not qualify for an impairment rating and that his report was entitled to special weight.

⁶ Docket No. 15-0764 (issued July 6, 2015).

On November 15, 2015 appellant, through counsel, requested reconsideration. Counsel submitted a December 15, 2014 report from Dr. Becan which he contended established 23 percent permanent impairment of the right lower extremity. In the December 15, 2014 report, Dr. Becan reviewed the prior medical evidence and disagreed with Dr. Sporn's findings, asserting that Dr. Sporn failed to provide sufficient detail regarding the lower extremity muscles tested and failed to properly utilize Semmes Weinstein Monofilament testing to determine sensation. Dr. Becan concluded, "According to my evaluation of February 2, 2009 and the sensory abnormalities found using Semmes Weinstein Monofilament testing as well as motor strength testing with specific muscles tested, mainly the quadriceps, hamstrings, gastrocnemius, and extensor hallucis longus bilaterally, I stand by my impairment as follows using *The Guides Newsletter* July/August 2009 with ... a final right lower extremity impairment of 23 percent [permanent impairment]." Dr. Becan provided his impairment calculations based on his original February 2, 2009 examination.

By decision dated August 4, 2016, OWCP denied modification of its prior decisions. It found that the special weight of the medical evidence remained with Dr. Sporn and that Dr. Becan's report was insufficient to create a conflict or establish appellant's permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁹

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.¹⁰ Because neither FECA nor the regulations provide for the

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

payment of a schedule award for the permanent loss of use of whole person or the back or spine,¹¹ no claimant is entitled to such an award.¹²

Amendments to FECA, however, 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹³

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁴ 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*.¹⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right lower extremity due to his accepted employment injury, thereby not warranting a schedule award.

OWCP accepted appellant's claim for aggravation of sciatic nerve on June 12, 2003. He filed a claim for a schedule award and submitted a report from Dr. Becan dated February 2, 2009 which supported bilateral lower extremity impairments due to the accepted condition. Dr. Becan found that appellant had total right leg impairment of 21 percent permanent impairment. In its December 24, 2013 decision, the Board found that this report was in conflict with the findings of Dr. Krisiloff regarding the percentage of permanent impairment of appellant's right lower extremity. On remand, OWCP referred appellant to Dr. Sporn for an impartial medical examination to resolve this conflict. The Board, on July 6, 2015, found that Dr. Sporn's report was sufficient to resolve the conflict of medical opinion evidence and did not establish any permanent impairment of appellant's right lower extremity due to his accepted employment injury.

¹¹ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹² *W.D., supra* note 10. *Timothy J. McGuire*, 34 ECAB 189 (1982).

¹³ *W.D., supra* note 10. *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5c(3) (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4).

On November 15, 2015 appellant requested reconsideration and submitted a December 15, 2014 report from Dr. Becan which reviewed the prior medical evidence and alleged deficiencies in Dr. Sporn's report. Dr. Becan concluded that based on his February 2, 2009 evaluation, appellant had 23 percent permanent impairment of his right lower extremity. His December 15, 2014 report updated his February 2, 2009 report in which he found appellant had 21 percent permanent impairment of the right lower extremity. Dr. Becan did not physically examine appellant after the February 2, 2009 report. The Board has held that an impairment rating that is not based on reasonably current examination findings is of little probative value.¹⁶ The Board finds that Dr. Becan did not base his rating on reasonably current findings and therefore his report is of little probative value. The Board further notes that as Dr. Becan was on one side of the conflict that Dr. Sporn resolved, the additional report from Dr. Becan, which lacks probative value as previously noted, is insufficient to overcome the special weight accorded Dr. Sporn's report as the impartial medical specialist or to create a new conflict with it.¹⁷ Therefore, the Board finds that appellant has not met his burden of proof.

The Board notes that counsel's contentions on appeal regarding IME Dr. Sporn's findings, were raised in a prior appeal and addressed in the Board's July 6, 2015 decision. Furthermore, as Dr. Becan in his December 15, 2014 report did not provide any new physical findings to support his updated impairment rating, the Board finds that counsel's contentions are not supported.

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 not met his burden of proof to establish permanent impairment of his right lower extremity due to his accepted employment injury thereby warranting a schedule award.

¹⁶ See *P.P.*, Docket No. 16-0831 (issued August 16, 2016); *P.S.*, Docket No. 12-0649 (issued February 14, 2013) (finding that a physician's January 2010 impairment rating was of reduced probative value as he relied on October 2007 findings as the basis for this updated impairment rating).

¹⁷ *R.R.*, Docket No. 16-0595 (issued August 5, 2016); *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

ORDER

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

Issued: July 27, 2017
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