



## ISSUE

The issues are: (1) whether appellant has met her burden of proof to establish T8-9, T9-10, and T10-11 disc herniations consequential to the accepted occupational spine conditions; and (2) whether appellant has met her burden of proof to establish greater than 10 percent permanent impairment of the left lower extremity and 10 percent permanent impairment of the right lower extremity, for which she previously received schedule awards.

## FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.<sup>4</sup> The facts relevant to the present appeal are set forth below.

OWCP accepted that on or before March 28, 2005 appellant, then a 48-year-old mail processing clerk, sustained a herniated C5-6 disc, a lumbar strain, and a right rotator cuff tear due to repetitive lifting and bending while handling mail. It later expanded the claim to include bilateral hip strains/sprains and an aggravation of osteoarthritis of both hips.<sup>5</sup> Appellant stopped work in May 2005 and did not return.

Appellant submitted medical reports dated from April 14, 2005 through July 14, 2008 from Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, diagnosing lumbar disc derangement, lumbar degenerative disc disease, a bilateral traumatic hip strain, right-sided lumbar radiculopathy and sciatica, and a herniated lumbar disc.

On June 20, 2008 appellant claimed a schedule award (Form CA-7). Dr. Chmell provided a November 19, 2009 report finding 57 percent permanent impairment of each leg due to restricted motion and weakness, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).<sup>6</sup> An OWCP medical adviser reviewed Dr. Chmell's report and found 10 percent permanent impairment of each lower extremity due to limited hip motion.

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<sup>4</sup> Docket No. 15-1879 (issued February 10, 2016). Docket No. 09-2007 (issued May 21, 2010), *petition for recon. denied*, Docket No. 09-2007 (issued September 28, 2010).

<sup>5</sup> OWCP accepted the following of appellant's claims: File No. xxxxxx089 for bilateral knee and ankle injuries; File No. xxxxxx273 for contusions of the right shoulder and upper arm, face, scalp, neck, and headaches; File Nos. xxxxxx861 and xxxxxx608 for three abdominal wall hernias and repairs; File Nos. xxxxxx055 and xxxxxx922 for bilateral carpal tunnel syndrome and right styloid tenosynovitis. In November 2009 OWCP administratively combined File Nos. xxxxxx273, and xxxxxx862 under Master File No. xxxxxx055.

<sup>6</sup> 5<sup>th</sup> ed. 2001.

By decision dated February 3, 2009, OWCP issued appellant a schedule award for 10 percent permanent impairment of each lower extremity.<sup>7</sup> Appellant appealed to the Board. The Board affirmed the schedule award by decision and order dated May 21, 2010.<sup>8</sup>

An April 30, 2009 magnetic resonance imaging (MRI) scan of appellant's thoracic spine demonstrated a right paracentral disc herniation at T8-9, a minute central disc herniation at T9-10, and a small left paracentral herniation at T10-11 without mass effect of the spinal cord.

Dr. Chmell provided periodic reports from June 4, 2009 through April 29, 2010 that did not address the thoracic spine. In a September 30, 2010 report, he diagnosed thoracic scoliosis. Dr. Chmell referred appellant for lumbar epidural injections to address right lower extremity sciatica and radiculopathy.

In a July 8, 2011 report, Dr. Chmell opined that unspecified medical records "documented an injury to the thoracic spine at work." He submitted periodic reports through September 2011 diagnosing thoracic scoliosis.

In a September 27, 2011 letter received on October 3, 2011, appellant requested reconsideration. By decision dated June 13, 2012, OWCP denied reconsideration as it was untimely filed within one year of the Board's May 21, 2010 decision, and failed to demonstrate clear evidence of error.

On June 20, 2012 appellant claimed a schedule award (Form CA-7) for lower extremity impairment related to thoracic disc herniations. As OWCP had not accepted thoracic disc herniations as compensable, it developed her claim as one for consequential injury. In support of her claim, appellant submitted August 6, 2012 lower extremity electromyography (EMG) and nerve conduction velocity (NCV) studies showing bilateral L5 radiculopathy and bilateral polyneuropathies. A May 4, 2013 lumbar MRI scan showed posterior facet degeneration from L1 to S1.<sup>9</sup>

In an August 16, 2013 letter, OWCP advised appellant of the additional evidence needed to establish her claim, including a report from her attending physician finding that she had attained maximum medical improvement, and a complete description and assessment of any impairment utilizing the tables and grading schemes of the sixth edition of the A.M.A., *Guides*.<sup>10</sup>

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<sup>7</sup> On March 3, 2010 OWCP obtained a second opinion from Dr. Rodrigo M. Ubilluz, a Board-certified neurologist, regarding whether appellant had any permanent impairment of the upper extremities due to the accepted injuries and conditions. Dr. Ubilluz found no ratable impairment of the arms under the sixth edition of the A.M.A., *Guides*.

<sup>8</sup> Docket No. 09-2007 (issued May 21, 2010), *petition for reconsideration denied*, Docket No. 09-2007 (issued September 28, 2010).

<sup>9</sup> In a June 7, 2013 letter, appellant requested reconsideration of OWCP's June 13, 2012 decision. OWCP responded by August 14, 2013 letter, noting that appellant's only avenue of appeal was to the Board. Appellant appealed to the Board on August 28, 2013, docketed as File No. 13-1975. In an April 7, 2014 order, the Board dismissed appellant's appeal as there was no adverse OWCP decision within 180 days of August 28, 2013 the date she filed her appeal with the Board. *Order Dismissing Appeal*, Docket No. 13-1975 (issued April 7, 2014).

<sup>10</sup> 6<sup>th</sup> ed. 2009.

It did not provide guidance regarding evidence necessary to establish a consequential injury claim.

An OWCP medical adviser reviewed the medical record on January 20, 2014. He explained that appellant's thoracic disc herniations were due to the aging process as there was no documented injury to the thoracic spine.

On April 10, 2014 OWCP obtained a second opinion from Dr. Allan Brecher, a Board-certified orthopedic surgeon, who opined that appellant's thoracic disc herniations were related to aging and not to appellant's federal employment. Dr. Brecher explained that the thoracic disc herniations did not cause any compression of the nerve roots or thecal sac.

In a March 20, 2014 report, Dr. Chmell opined that in addition to the accepted conditions, appellant sustained lumbar derangement, L5 radiculopathy, cervical derangement, thoracic derangement, bilateral ankle and foot derangement, and traumatic arthropathy of the lower legs. He attributed these conditions to "work-injury by direct cause."<sup>11</sup> On June 12, 2014 Dr. Chmell found "muscle spasm and tenderness in the cervical, thoracic, and lumbosacral areas of the spine." He diagnosed thoracic scoliosis.

OWCP found a conflict of medical opinion between Dr. Brecher, for the government, and Dr. Chmell, for appellant, regarding whether appellant sustained consequential thoracic disc herniations. To resolve the conflict, OWCP selected Dr. Kevin M. Koutsky, a Board-certified orthopedic surgeon. Dr. Koutsky submitted a July 24, 2014 report reviewing the medical record and a statement of accepted facts (SOAF). He noted that an April 30, 2009 MRI scan of the thoracic spine showed minimal degenerative changes including right paracentral disc protrusion at T8-9, central disc protrusion noted at T9-10, and small left paracentral disc protrusion noted at T10-11. On examination, Dr. Koutsky noted tenderness to palpation of the parathoracic region without focal spasm, minimal limitation of thoracic spine motion, and some decreased sensation below both knees in a stocking distribution consistent with polyneuropathy. He also noted nonorganic signs indicative of somatization. Dr. Koutsky diagnosed age-related degenerative changes of the thoracic spine, unrelated to work factors. He explained that appellant had no permanent impairment related to a thoracic injury or condition.

By decision dated July 28, 2014, OWCP denied appellant's claim for consequential thoracic disc herniations at T8-9, T9-10, and T10-11 as the medical evidence did not support causal relationship. It accorded the special weight of the medical evidence to Dr. Koutsky.

In an August 20, 2014 letter, appellant requested an oral hearing, held before an OWCP hearing representative on February 11, 2015. Following the hearing, she provided copies of medical evidence previously of record. Appellant also requested that OWCP subpoena x-rays taken by Dr. Koutsky on July 9, 2014.

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<sup>11</sup> In a May 6, 2014 letter, appellant requested a hearing regarding the Board's April 7, 2014 order. By decision dated June 12, 2014, OWCP denied appellant's request for hearing as the Branch of Hearings and Review does not have jurisdiction to review final decisions of the Board.

In a March 27, 2015 letter, appellant requested reconsideration from OWCP regarding the Board's April 7, 2014 order dismissing appeal. She contended that OWCP had improperly developed her schedule award claim. Appellant submitted copies of medical reports previously of record.

In an April 21, 2015 decision, an OWCP hearing representative affirmed the July 28, 2014 decision, finding that the medical evidence did not establish that appellant sustained a consequential thoracic spine condition. He also denied appellant's request for a subpoena finding that the requested x-rays were unnecessary to resolve the issue in the case.

By decision dated July 1, 2015, OWCP denied appellant's March 27, 2015 request for reconsideration as her request did not raise substantive legal questions or include relevant and pertinent new evidence. Appellant then appealed to the Board.

By decision dated February 10, 2016,<sup>12</sup> the Board affirmed OWCP's April 21, 2015 merit decision, finding that appellant failed to establish consequential thoracic disc herniations, and that OWCP had properly denied her request for a subpoena. The Board also affirmed OWCP's July 1, 2015 nonmerit decision denying appellant's request for reconsideration.

In a June 16, 2016 letter, received by OWCP on June 21, 2016, appellant requested reconsideration. She alleged a pattern of fraud and misfeasance in OWCP's development and adjudication of her claim. Appellant also contended that a September 8, 2008 SOAF wrongly omitted an accepted aggravation of osteoarthritis of both hips. She submitted additional evidence including a February 24, 2014 letter to the Secretary of Labor and a December 20, 2015 letter to the Department of Justice alleging wrongdoing in the adjudication of her claim. In a March 2, 2016 e-mail, appellant alleged a pattern of waste, fraud, and abuse by OWCP. She requested an investigation by the Office of the Inspector General (OIG).

OWCP responded by March 24, 2016 letter, summarizing the history of appellant's claim, noting that there was no evidence of misconduct warranting a referral to OIG. On March 28, 2016 appellant sent an e-mail to the Secretary of Labor, alleging a pattern of misconduct by OWCP in adjudicating her claim. In an April 8, 2016 letter, OWCP notified her that if she disagreed with prior decisions, she should exercise her appeal rights.

Thereafter appellant submitted a December 3, 2015 report from Dr. Chmell noting appellant's continued and worsening cervical, thoracic, and lumbosacral spine, with radiation into the upper and lower extremities. He prescribed physical therapy and requested authorization for MRI scans of the cervical, thoracic, and lumbar spine. A June 22, 2016 MRI scan of the cervical spine showed posterior osteophytes at C5-6, previously demonstrated on an April 30, 2009 scan.

Appellant also submitted copies of documents relative to the second opinion or examination, an October 9, 2008 telephone memorandum (Form CA-110) noting that OWCP would develop whether appellant sustained an occupational bilateral hip condition, and an

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<sup>12</sup> Docket No. 15-1879 (issued February 10, 2016).

October 9, 2008 letter from OWCP to Dr. Chmell. In a May 7, 2016 letter, appellant requested that the Director of OWCP file a brief or otherwise advocate on her behalf regarding her claim.

Appellant submitted her June 2, 2016 letter to the Secretary of Labor, requesting authorization of Dr. Chmell's request for physical therapy and MRI scans. In a June 14, 2016 letter, OWCP authorized physical therapy and MRI scans.

Appellant sent an August 16, 2016 e-mail to the Secretary of Labor, alleging that OWCP failed to properly adjudicate her claims. In an August 24, 2016 letter, OWCP acknowledged appellant's correspondence to the Secretary of Labor, and notified her that her claim for reconsideration was under development.

In an August 25, 2016 decision, OWCP denied modification of its February 3, 2009 schedule award decision and the hearing representative's April 21, 2015 denial of a consequential thoracic spine condition. It found that the evidence of record did not establish that appellant sustained greater than 10 percent permanent impairment of each lower extremity previously awarded, or that she sustained thoracic disc herniations as a consequence of the accepted spinal injuries and conditions.

### **LEGAL PRECEDENT -- ISSUE 1**

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.<sup>13</sup> In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, then a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>14</sup>

The Board has held that if a member weakened by an employment injury contributes to a later injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury.<sup>15</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>16</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the

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<sup>13</sup> *Albert F. Ranieri*, 55 ECAB 598, 602 (2004); *A. Larson*, *The Law of Workers' Compensation* § 10.01 (2000).

<sup>14</sup> *Charles W. Downey*, 54 ECAB 421, 422-23 (2003).

<sup>15</sup> *S.M.*, 58 ECAB 166 (2006); *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

<sup>16</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>17</sup>

### **ANALYSIS -- ISSUE 1**

On reconsideration, appellant submitted a December 3, 2015 letter from Dr. Chmell, an attending Board-certified orthopedic surgeon, asserting that her spinal symptoms and radiculopathy had worsened. Dr. Chmell requested authorization for additional imaging studies and physical therapy. However, he did not explain how and why objective findings on examination or in imaging studies established that the accepted spinal injuries and conditions caused T8-9, T9-10, and T10-11 disc herniations. Without such rationale, Dr. Chmell's opinion is insufficient to meet appellant's burden of proof in establishing causal relationship.<sup>18</sup>

Appellant also provided a June 22, 2016 MRI scan report demonstrating posterior osteophytes at C5-6. As this report addresses the cervical spine, not the thoracic spine, it is irrelevant to the claim and insufficient to meet appellant's burden of proof. Also, appellant's correspondence to and from OWCP and other government offices is not germane to the medical issues in the claim as it does not constitute medical evidence.<sup>19</sup>

On appeal appellant contends that the medical evidence of record is sufficient to establish that she sustained consequential thoracic disc herniations. As explained above, she did not provide sufficient rationalized medical evidence to establish causal relationship in her claim for a consequential injury.

Appellant may submit new evidence or argument, with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provisions of FECA<sup>20</sup> and its implementing regulations<sup>21</sup> 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 regulation as the

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<sup>17</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>18</sup> *W.M.*, Docket No. 16-1658 (issued May 3, 2017).

<sup>19</sup> *Edward Matthew Diekemper*, 31 ECA 224, 225 (1979).

<sup>20</sup> 5 U.S.C. § 8107.

<sup>21</sup> 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.<sup>22</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>23</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>24</sup> 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.<sup>25</sup> 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.<sup>26</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 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.<sup>27</sup> 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.<sup>28</sup>

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>29</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>30</sup> OWCP's procedures provide that, after obtaining all necessary medical evidence, the

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<sup>22</sup> *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

<sup>23</sup> *Id.* at Chapter 2.808.5a (February 2013).

<sup>24</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>25</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>26</sup> *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

<sup>27</sup> *Supra* note 21.

<sup>28</sup> 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.

<sup>29</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>30</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.<sup>31</sup>

### **ANALYSIS -- ISSUE 2**

On February 3, 2009 OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity, causally related to her accepted hip and lumbar conditions. Appellant claimed an additional schedule award on June 12, 2012, asserting additional lower extremity impairment due to thoracic disc herniations.

In support of her claim, appellant submitted a December 3, 2015 letter from Dr. Chmell, commenting that her spinal symptoms and radiculopathy had worsened. He prescribed physical therapy and requested authorization for additional MRI scans. However, Dr. Chmell did not explain which clinical findings or test results indicated an objective worsening of the accepted conditions such that they would cause additional permanent impairment of the lower extremities. Without such rationale, his opinion is insufficient to establish an increased percentage of permanent impairment as claimed.<sup>32</sup>

Appellant also provided a June 22, 2016 MRI scan demonstrating posterior osteophytes at C5-6. This report did not address permanent impairment of the lower extremities. It is therefore irrelevant to the claim.

The Board finds that the special weight of the medical evidence continues to rest with the opinion of Dr. Koutsky, a Board-certified orthopedic surgeon and impartial medical examiner, who opined that appellant had 10 percent permanent impairment of each lower extremity. Dr. Koutsky provided the only impairment rating of record that properly applied the sixth edition of the A.M.A., *Guides*.<sup>33</sup> He properly reviewed the medical record and evaluated appellant's lower extremities in accordance with the A.M.A., *Guides*, determining that appellant had 10 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity. Dr. Chmell's December 3, 2015 letter and prescriptions, and the June 22, 2016 MRI scan report, failed to establish that appellant sustained permanent impairment greater than 10 percent each for the right and left lower extremities.<sup>34</sup> The record does not contain any other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* that shows greater impairment.

On appeal appellant contends that the medical record supports a greater percentage of permanent impairment to her lower extremities than the 10 percent permanent impairment of each lower extremity previously awarded. As explained above, the medical evidence of record

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<sup>31</sup> Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

<sup>32</sup> *S.G.*, Docket No. 16-1882 (issued March 22, 2017).

<sup>33</sup> *Id.*

<sup>34</sup> A.M.A., *Guides* 516.

does not establish an increased percentage of permanent impairment warranting an increased schedule award.

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 her burden of proof to establish that she sustained T8-9, T9-10, and T10-11 disc herniations consequential to accepted occupational spine conditions. The Board further finds that appellant has not established that she sustained greater than 10 percent permanent impairment of the left lower extremity and 10 percent permanent impairment of the right lower extremity, for which she previously received schedule awards.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2016 is affirmed.

Issued: November 28, 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