

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

J.S., Appellant

and

**DEPARTMENT OF HEALTH & HUMAN
SERVICES, NATIONAL INSTITUTES OF
HEALTH, Bethesda, MD, Employer**

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**Docket No. 17-0541
Issued: October 17, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from an October 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has established a permanent impairment of a scheduled member warranting him to a schedule award.

FACTUAL HISTORY

On August 10, 2007 appellant, then a 37-year-old utility systems repairman, filed a traumatic injury claim (Form CA-1) alleging that on July 18, 2007 he injured his lower back while moving equipment to a dumpster. He stopped work on August 10, 2007. By decision dated November 6, 2007, OWCP accepted appellant's claim for displacement of the right lumbar intervertebral disc without myelopathy. Appellant received medical and wage-loss compensation on the supplemental roll from September 24, 2007 until he was placed on the periodic rolls. He returned to full-time work on June 10, 2009.

OWCP continued to receive progress notes and copies of prescription orders for treatment of appellant's accepted lumbar condition.

On March 11, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated April 8, 2015, OWCP informed appellant that it had not received any medical evidence in support of his claim. It advised that the medical evidence was needed in order to determine the extent, if any, of permanent impairment. It afforded him 30 days to submit additional evidence.

In a report dated July 27, 2015, Dr. Pauline Ignacio, Board-certified in physical medicine and rehabilitation, examined appellant, reviewed his history of injury, and reviewed diagnostic studies of his spine. She diagnosed disorder of lumbar disc, lumbar pain, and lumbar radiculopathy, and noted that appellant continued to have soreness and stiffness in his back. Dr. Ignacio recommended aquatherapy, work modifications, and taking precautions with his lumbar area. Appellant submitted additional reports from Dr. Ignacio dated March 9, April 6, May 4, June 1, and June 29, 2015, which were substantially similar to the July 27, 2015 report and included the same diagnoses. Dr. Ignacio did not render an impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) in these reports.

By decision dated August 12, 2015, OWCP denied appellant's claim for a schedule award. It found that he had not submitted any medical evidence from a physician containing an impairment rating rendered according to the A.M.A., *Guides*.

On August 17, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative with regard to the August 12, 2015 decision. With his request, appellant submitted follow-up evaluation reports from Dr. Ignacio dated August 24, September 21, October 19, November 16, and December 14, 2015, January 11, February 8, and March 7, 2016. These reports were substantially similar to the report of July 27, 2015 and contained the same diagnoses of disorder of lumbar disc, lumbar pain, and lumbar radiculopathy,

as well as the same recommendations for treatment. They did not contain an impairment rating rendered according to the A.M.A., *Guides*.

The hearing was held on March 11, 2016. At the hearing, counsel explained that appellant had an upcoming appointment with Dr. Robert Macht, a surgeon, in order to obtain an impairment rating. He requested that the record be held open for 30 days in order to submit this report.

By letter dated March 29, 2016, counsel requested an additional 15 to 30 days in order to submit the report.

By decision dated May 5, 2016, the hearing representative affirmed the decision of August 12, 2015. She noted that no report from Dr. Macht had been received and that there was no medical evidence of record containing an impairment rating rendered according to the A.M.A., *Guides*.

In a follow-up report dated May 2, 2016, Dr. Ignacio examined appellant and stated that appellant had good motor strength in the lower limbs, and that light touch was intact in the bilateral lower extremities. She further noted that appellant's knees had functional range of motion with no swelling, crepitus, or tenderness.

By letter dated June 24, 2016, appellant, through counsel, again requested reconsideration of the May 5, 2016 decision. With the request for reconsideration, appellant submitted a May 3, 2016 report from Dr. Macht. Dr. Macht noted that a December 2014 electromyogram (EMG) demonstrated chronic right L5 radiculopathy. On physical examination, he noted that there was decreased sensation to light touch about the right foot and lateral right thigh, mild weakness of extension of the great toe, and a positive straight leg raising test on the right at 40 degrees with back pain only. Based on a lower limb questionnaire, Dr. Macht found that his standardized mean score was 37 out of 100. Referring to Table 16-6 of the A.M.A., *Guides*, he found a grade modifier of 1 for Functional History. Referring to *The Guides Newsletter* of July/August 2009, he found a mild sensory deficit, class 1 and mild motor deficit, class 1 impairment of the right L5 nerve root. Dr. Macht found a grade modifier of 1 for Physical Examination based on Table 16-6 of the A.M.A., *Guides*. He found one percent impairment of the right lower extremity due to sensation loss and five percent permanent impairment for the mild motor deficit, which resulted in a total of six percent permanent impairment of the right lower extremity. Dr. Macht concluded that the impairment rating was causally related to the accepted injury and that maximum medical improvement (MMI) was reached on April 29, 2016.

In a follow-up report dated May 27, 2016, Dr. Dr. Ignacio examined appellant and once again found good motor strength in the lower limbs, and that light touch was intact in the bilateral lower extremities. She noted that appellant's knees had functional range of motion with no swelling, crepitus, or tenderness.

On September 14, 2016 OWCP referred the case to a district medical adviser (DMA). He was asked to review the medical evidence of record and the statement of accepted facts (SOAF), in order to provide a rating of appellant's permanent impairment of his right lower extremity, in accordance with the sixth edition of the A.M.A., *Guides*.

On September 27, 2016 Dr. Morley Slutsky, Board-certified in occupational medicine serving as a DMA, reviewed the medical evidence of record and responded to OWCP's inquiries. He found that there was no basis for a lower extremity impairment under *The Guides Newsletter* of July/August 2009, because appellant had been consistently found to have normal lower extremity sensory and motor findings. Dr. Slutsky noted that, although Dr. Macht found decreased light touch in the right foot and mild L5 motor loss associated with the great toe, Dr. Ignacio's reports from before and after Dr. Macht's report found normal sensation and motor strength of both lower extremities. As such, he found that there was consistent evidence of normal lower extremity sensory and motor findings and therefore no basis for a ratable lower extremity impairment.

By decision dated October 7, 2016, OWCP reviewed the merits of appellant's claim and affirmed its decision of May 5, 2016. It found the weight of the medical evidence with Dr. Slutsky.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing federal regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body. 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.⁷ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.⁸

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.⁹ A

³ *Id.* at § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁶ *Id.*

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁸ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a.3 (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

⁹ *Pamela J. Darling*, 49 ECAB 286 (1998).

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.¹⁰ Moreover, neither FECA nor its implementing regulations provide 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.¹¹

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.¹²

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.¹³ 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.¹⁴ 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.¹⁵

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.¹⁶

ANALYSIS

Appellant filed a claim for a schedule award due to his accepted July 18, 2007 work-related injury. The Board finds that the medical evidence of record fails to establish any permanent impairment of a scheduled member warranting a schedule award.

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹² *J.Q.*, 59 ECAB 367 (2008).

¹³ 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.

¹⁴ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁵ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

The only medical report of record from appellant with an impairment rating is the June 24, 2016 report of Dr. Macht. In this report, Dr. Macht noted that a December 2014 EMG study demonstrated chronic right L5 radiculopathy. On physical examination, he noted that there was decreased sensation to light touch about the right foot and lateral right thigh, mild weakness of extension of the great toe, and a positive straight leg raising test on the right at 40 degrees with back pain only. Referring to Table 16-6 of the A.M.A., *Guides*, Dr. Macht found a grade modifier of 1 for Functional History. Referring to *The Guides Newsletter* of July/August 2009, he found a mild sensory deficit, class 1 and mild motor deficit, class 1 impairment of the right L5 nerve root. Dr. Macht found a grade modifier of 1 for Physical Examination based on Table 16-6 of the A.M.A., *Guides*. He found one percent impairment of the right lower extremity due to sensation loss and five percent permanent impairment for the mild motor deficit, which resulted in a total of six percent permanent partial impairment of the right lower extremity. Dr. Macht stated that the impairment was causally related to his accepted injury and that appellant had reached maximum medical improvement on April 29, 2016.

In follow-up reports dated May 2 and 27, 2016, Dr. Ignacio examined appellant and noted that appellant had good motor strength in the lower limbs, and that light touch was intact in the bilateral lower extremities. She further noted that appellant's knees had functional range of motion with no swelling, crepitus, or tenderness.

On September 27, 2016 Dr. Slutsky, the DMA, reviewed the medical evidence of record and responded to OWCP's inquiries. He found that there was no basis for a lower extremity impairment under *The Guides Newsletter* of July/August 2009, because appellant had been consistently found to have normal lower extremity sensory and motor findings. Dr. Slutsky noted that, although Dr. Macht found decreased light touch in the right foot and mild L5 motor loss associated with the great toe, Dr. Ignacio's reports from both before and after Dr. Macht's report found normal sensation and motor strength of both lower extremities. As such, he found that there was consistent evidence of normal lower extremity sensory and motor findings and therefore no basis for a ratable lower extremity impairment.

The Board finds that OWCP correctly assigned the weight of medical evidence to Dr. Slutsky's September 27, 2016 report. It is well established that, where there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹⁷ However, in this case, Dr. Macht's report was not of virtually equal weight and rationale as Dr. Slutsky's report. A review of the medical evidence indicates that Dr. Ignacio, appellant's treating physician, during her physical examinations consistently found no motor or sensory deficits of appellant's lower extremities. Dr. Ignacio's findings of no motor or sensory deficits were noted both before and after Dr. Macht's report. Dr. Ignacio has consistently followed appellant's course of injury and treatment and found no sensory or motor deficits in the right lower extremity. Dr. Macht, however, having examined appellant only once, found sensory and motor deficits. His June 24, 2016 report has lesser probative value than Dr. Ignacio's reports. Dr. Slutsky was correct to find that, based on Dr. Ignacio's reports finding no sensory or motor deficits in the lower extremities, there was no ratable permanent impairment of the right lower extremity.

¹⁷ *H.S.*, Docket No. 10-1220 (issued May 24, 2011).

Accordingly, the Board finds that OWCP properly denied appellant's claim for schedule award compensation.

Appellant may request a 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 has not established a permanent impairment of a scheduled member warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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