

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained a permanent impairment as a result of his accepted employment injuries warranting a schedule award.

FACTUAL HISTORY

On April 5, 2012 appellant, then a 55-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on April 4, 2012 he injured his right shoulder and neck area lifting and moving a dresser.³ He returned to full-time light-duty work.

Appellant underwent a magnetic resonance imaging (MRI) scan on April 30, 2012 which demonstrated C3-4 and C4-5 degenerative disc disease with moderate stenosis at C3-4 and left cord impingement at C4-5. He underwent a right shoulder MRI scan on the same date which was normal.

On August 2, 2012 Dr. Michael Kasten, a Board-certified orthopedic surgeon, examined appellant due to his cervical condition which he attributed to an injury at work as well as a bad coughing spell. He noted that appellant had experienced this condition for a year. Dr. Kasten reported that appellant's pain had been present since an August 17, 2011 work injury. He recommended back surgery due to severe cervical spondylosis and stenosis with persistent right arm pain. Dr. Kasten released appellant to return to sedentary work on August 7, 2012.

By decision dated August 10, 2012, OWCP denied appellant's traumatic injury claim finding that he had not established a causal relationship between his diagnosed cervical conditions and his accepted employment incident.

In a note dated September 7, 2012, Dr. Joseph Burkhardt, an osteopath, diagnosed left C4-5 disc herniation. He attributed appellant's herniated cervical disc to moving carts at work on August 17, 2011 and moving a dresser on April 4, 2012. Dr. Burkhardt noted, "There is a likely association with the findings on MRI [scan] and the reported incidents at work."

On September 17, 2012 appellant requested reconsideration of the August 10, 2012 decision. He stopped work on October 2, 2012 after the employing establishment terminated his light-duty assignment. By decision dated November 28, 2012, OWCP accepted appellant's April 4, 2012 claim for aggravation of multilevel cervical disc disease and disc herniation at C4-5 with radiculopathy. Appellant returned to full-time limited-duty work on December 10, 2012.

³ Appellant has several traumatic injury claims accepted by OWCP. On December 22, 2006 he sustained a pulled back muscle in a short form closure case. File No. xxxxxx864. On September 18, 2008 appellant was attacked by a patient. OWCP accepted this claim for right shoulder and cervical spine sprain. File No. xxxxxx599. On June 23, 2010 appellant sustained a work-related groin strain. File No. xxxxxx136. On June 21, 2011 appellant sustained a fractured tooth when a mop handle struck him in the face. File No. xxxxxx196. Appellant sustained a right trapezius strain on March 20, 2010 after lifting a bag of soiled linen. OWCP denied his claim for permanent impairment of the right upper extremity on November 10, 2015. File No. xxxxxx735.

Appellant filed a notice of recurrence (Form CA-2a) alleging that on December 19, 2012 he had stopped work as a result of his April 4, 2012 employment injury.

On January 17, 2013 OWCP referred appellant for a second opinion evaluation with Dr. Donald C. Austin, a Board-certified neurosurgeon. It provided Dr. Austin with a statement of accepted facts (SOAF) which included three accepted employment injuries to the neck and shoulders. These claims were File No. xxxxxx599 which resulted in accepted conditions of right supraspinatus strain and cervical strain following a June 24, 2008 attack by a patient; File No. xxxxxx735 which resulted in a right trapezius strain as a result of lifting heavy bags of linen on August 17, 2011; and the current claim for injury on April 4, 2012 as a result of moving a dresser.

On February 6, 2013 OWCP accepted appellant's recurrence of disability claim. Appellant had returned to light-duty work on January 24, 2013. He stopped work again on April 30, 2013.

In a report dated February 6, 2013, Dr. Austin noted appellant's employment injury on June 24, 2008 when he was assaulted by a patient. Appellant reported that he returned to full-duty, but continued to experience pain radiating down the middle of his back. On August 17, 2011 he developed pain in his right neck and shoulder lifting a heavy bag at work. Appellant returned to light-duty work after August 17, 2011 and continued to perform light duty. Dr. Austin did not describe the April 4, 2012 employment injury, but mentioned a motor vehicle accident occurring in 2011. He concluded that the accepted condition of aggravation of cervical disc herniation with radiculopathy had ceased based on objective findings, although appellant reported subjective symptoms. Dr. Austin concluded that appellant could return to full duty in his date-of-injury position.

In a note dated May 1, 2013, Dr. Burkhardt recommended that appellant undergo surgery for his herniated disc and radiating pain into his arm. Appellant retired from the employing establishment on June 14, 2013. He elected to receive benefits from the Office of Personnel Management (OPM) effective June 14, 2013.

OWCP declared a conflict in the medical opinion evidence between Drs. Burkhardt and Austin. In a letter dated April 9, 2014, it referred appellant for an impartial medical examination with Dr. Clifford Buchman, an osteopath Board-certified in orthopedics. Dr. Buchman completed a report on May 6, 2014 and noted the accepted condition of aggravation of multilevel cervical disc herniations at C4-5. He described appellant's employment injuries in 2008 and 2011. Dr. Buchman diagnosed neck pain without clinical findings of radiculopathy. He reported that appellant had no objective findings and that his accepted condition had resolved. Dr. Buchman noted that appellant's MRI scan had shown pathology on the left, while appellant's symptoms were on the right. He opined that appellant could return to his regular full-duty position.

In a letter dated July 1, 2014, OWCP proposed to terminate appellant's entitlement to wage-loss compensation and medical benefits due to his April 4, 2012 employment injury as it found the weight of the medical evidence established that his work-related condition of

aggravation of multilevel cervical disc disease and herniation at C4-5 with radiculopathy had resolved. Appellant was allotted 30 days to submit additional evidence, but failed to do so.

By decision dated August 21, 2014, it terminated appellant's wage-loss compensation and medical benefits effective that date.

Appellant underwent electromyogram (EMG) and nerve conduction velocity (NCV) studies on July 16, 2014. These studies demonstrated bilateral carpal tunnel syndrome with no evidence of cervical radiculopathy or generalized peripheral neuropathy.

On August 5, 2014 Dr. Burkhardt noted that appellant was involved in a motor vehicle accident on July 8, 2014. He diagnosed cervical degenerative disc disease and bilateral moderate carpal tunnel syndrome.

In a note dated April 22, 2015, Dr. Burkhardt opined that appellant had reached maximum medical improvement (MMI). Appellant filed a schedule award claim (Form CA-7) on September 4, 2015.

On September 29, 2015 OWCP requested additional medical evidence addressing appellant's permanent impairment for schedule award purposes. It afforded appellant 30 days for a response. Appellant did not respond within the time allotted.

By decision dated November 5, 2015, OWCP denied appellant's claim for a schedule award as the medical evidence did not establish permanent impairment to a scheduled member. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on November 17, 2015.

Appellant testified at the oral hearing before an OWCP hearing representative on July 14, 2016. He asserted that his cervical condition resulted in symptoms in his arms.

On August 4, 2016 appellant underwent a cervical spine MRI scan which demonstrated moderate central stenosis and mild right foraminal stenosis at C3-4, as well as moderate central and left foraminal stenosis at C4-5 with mild right foraminal stenosis, and moderate right foraminal stenosis at C6-7 with mild central and left foraminal stenosis. He also underwent EMG and NCV studies on August 4, 2016 which demonstrated mild median nerve compression at both wrists and possible peripheral neuropathy in the lower extremities. On August 9, 2016 appellant underwent a functional capacity evaluation conducted by Stephen Williams, a physical therapist.

On September 8, 2016 Dr. Neil Allen, a Board-certified neurologist, examined appellant to determine his permanent impairment for schedule award purposes. He described an employment incident on September 18, 2008 during which appellant was assaulted by a patron. Dr. Allen opined that appellant sustained a cervical spine injury with pain and numbness extending into both hands and difficulty swallowing. He found that appellant had 18 percent

motor impairment of the upper extremities based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

In a decision dated September 28, 2016, OWCP's hearing representative found that appellant had not submitted the necessary medical evidence to establish permanent impairment of a scheduled member warranting a schedule award.

In a letter dated November 15, 2016, counsel requested reconsideration of the September 28, 2016 OWCP decision.

By decision dated February 9, 2017, OWCP reviewed the merits of appellant's claim and found that he had submitted insufficient medical evidence to establish permanent impairment of his upper extremities warranting a schedule award. It found Dr. Allen did not attribute appellant's current permanent impairment to the accepted employment injury on April 4, 2012. OWCP found that Dr. Allen's report was not based on an accurate history of injury and was insufficient to meet appellant's burden of proof to establish permanent impairment as a result of his accepted employment injury.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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*.⁷

It is the claimant's burden of proof to establish a permanent impairment of the scheduled member or function as a result of any employment injury.⁸ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this

⁴ 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).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Supra* note 4.

⁸ *Tammy L. Meehan*, 53 ECAB 229 (2001); *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with 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 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 this case is not in posture for a decision.

The record before the Board is replete with references to appellant's previously accepted traumatic injury claims for cervical spine injuries. The SOAF provided to the second opinion physician, Dr. Austin, and impartial medical specialist, Dr. Buchman, addressed these injuries. The medical evidence that appellant provided in support of his claim for permanent impairment

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

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

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*, Chapter 3.700 Exhibit 4 (January 2010).

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

of his upper extremity due to cervical spine injury referenced his 2008 employment injury when he was attacked by a patient.

OWCP procedures provide that cases should be combined when correct adjudication of the issues depends on frequent cross-reference between files. For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.¹⁶ In the instant case, the record reveals that appellant had a series of previously accepted claims for cervical injuries beginning in 2006, File No. xxxxxx864; 2008, File No. xxxxxx599; and 2010, File No. xxxxxx735. Appellant subsequently filed the current claim for cervical injury on April 4, 2012, File No. xxxxxx651. The factual and medical evidence pertaining to appellant's previous cervical injuries are not contained in the case record.

Appellant filed a schedule award claim and his physician attributed his permanent impairment to the September 18, 2008 employment injury when appellant was attacked by a patient which OWCP accepted for right shoulder and cervical spine sprain.¹⁷ OWCP failed to properly combine or request combination of the present case record with the record of the September 18, 2008 employment injury which, unlike the current employment injury, was thoroughly discussed by OWCP referral physicians and appellant's physician in addressing permanent impairment.¹⁸

The Board will consequently remand the case for OWCP to combine the current case record with File Nos. xxxxxx864, xxxxxx599, and xxxxxx735, and determine whether appellant has sustained a permanent impairment of a scheduled member due to these injuries. Following this and any further development deemed necessary, it shall issue a *de novo* decision on the merits.

CONCLUSION

The Board finds this case is not in posture for a decision.

¹⁶ See *B.T.*, Docket No. 15-0571 (issued May 26, 2015); *A.M.*, Docket No. 14-9 (issued April 15, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (October 2014).

¹⁷ File No. xxxxxx599.

¹⁸ *W.G.*, Docket No. 15-0416 (issued July 13, 2015); *V.T.*, Docket No. 14-0296 (issued May 5, 2014).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: October 10, 2017
Washington, DC

Christopher J. Godfrey, 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