

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 28, 2001 appellant, then a 33-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on August 25, 2001 when a heavy jug fell on top of him. OWCP accepted the claim for low back sprain, and cervical radiculopathy, right C6 and bilateral C8-T11. Appellant was off work from August 25, 2001 to November 15, 2002, then had a recurrence of disability commencing April 6, 2003. He initially received wage-loss compensation benefits on the supplemental roll for his intermittent periods of wage loss commencing October 28, 2001. Appellant also received wage-loss compensation and medical benefits on the periodic rolls from November 2, 2003 through April 2, 2014, when he elected Office of Personnel Management (OPM) benefits.

The record contains an April 13, 2014 report of a cervical electromyogram (EMG) and nerve conduction velocity (NCV) study report for the upper extremities and an electrodiagnostic study for the lower extremities dated December 16, 2014.

In a report dated May 3, 2015, Dr. Tomas Hernandez Ortiz, a neurologist, provided a history and results of an April 28, 2015 examination. He reported moderate loss of fingering and grip strength, with no sensory deficit in any of the modalities tested. Dr. Hernandez Ortiz provided a whole person permanent impairment rating of 16 percent under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*), using a "Spine and Pelvis impairment calculation methodology" for the cervical and lumbar spine.

OWCP requested that district medical adviser (DMA), Dr. Henry Magliato, review the report from Dr. Hernandez Ortiz and provide an opinion as to permanent impairment. In a report dated June 16, 2015, Dr. Magliato opined that the report of Dr. Hernandez Ortiz was of no value in determining permanent impairment under the A.M.A., *Guides*. The medical adviser indicated that Dr. Hernandez Ortiz had used diagnostic grids for the spine and whole person impairment, which were not appropriate under FECA. He recommended referral to a second opinion physician.

On July 20, 2015 OWCP received a revised report dated July 11, 2015 from Dr. Hernandez Ortiz. The examination results from April 28, 2015 were repeated, however, Dr. Hernandez Ortiz provided an opinion as to permanent impairment based on *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) (hereinafter *The Guides Newsletter*). For the upper extremities, Dr. Hernandez Ortiz opined there was one percent impairment for sensory deficit and five percent for motor deficit of C6 root and T1 nerve roots. He indicated that although only a right C6 root lesion had been accepted, it was appropriate to provide a bilateral upper extremity impairment rating. Dr. Hernandez Ortiz found 12 percent permanent impairment for the bilateral C8-T1 root lesions for a total of 18 percent permanent impairment for the upper extremities nerve

² Docket No. 16-0905 (issued January 4, 2017).

involvement. As to the lower extremities, Dr. Hernandez Ortiz opined that there was one percent impairment for sensory deficit and three percent impairment for motor deficit to each lower extremity.

OWCP referred appellant for a second opinion examination by Dr. Fernando Rojas, an orthopedic surgeon. In a report dated September 22, 2015, Dr. Rojas provided a history and results on August 28, 2015 examination. He opined that there was two percent right and left upper extremity impairment based on carpal tunnel syndrome, with no impairment based on *The Guides Newsletter*. In applying *The Guides Newsletter* Dr. Rojas simply assigned zeros for all diagnosis classes and grade modifiers.

By report dated October 27, 2015, Dr. Magliato found that the second opinion physician's report was confusing and of "no value." The DMA indicated that Dr. Rojas had provided vague calculations that were difficult to understand, and he noted that carpal tunnel syndrome had not been accepted. He recommended referral to another second opinion physician. In a memorandum of telephone call (Form CA-110) dated November 24, 2015, OWCP advised appellant that he would be receiving another referral for a second opinion examination.

The record contains a letter dated November 24, 2015 from the second opinion referral service (Medical Consultants Network), advising that Dr. Rojas was the only orthopedic surgeon on panel who performed federal workers' compensation examinations. OWCP sent a letter dated November 25, 2015 to Dr. Hernandez Ortiz, requesting an additional report regarding permanent impairment. It referred to *The Guides Newsletter* and noted that whole person impairments were not appropriate under FECA.

In a report dated December 12, 2015, Dr. Hernandez Ortiz reported that he had already answered OWCP's questions in his July 11, 2015 report. OWCP referred the evidence to another DMA, Dr. Arthur Harris, for review.

In a report dated January 8, 2016, Dr. Harris opined that appellant had one percent permanent impairment each of the right and left upper and lower extremities. He indicated that for the upper extremities, there was one percent impairment for C6 nerve root "mild pain/impaired sensation." In discussing this impairment, Dr. Harris referred to the May 3, 2015 report from Dr. Hernandez Ortiz, and indicated that Dr. Hernandez Ortiz had improperly used the diagnosis-based grids for the spine. As to the lower extremities, he found there was one percent impairment for L5 mild pain/impaired sensation. Dr. Harris did not discuss motor deficit. He reported that there was no impairment for C8 and T1 radiculopathy, as the attending physician did not demonstrate any neurological deficit consistent with radiculopathy. Dr. Harris indicated that electrodiagnostic studies were consistent with C6 and L5 radiculopathy.

By decision dated January 19, 2016, OWCP issued a schedule award for one percent permanent impairment each upper extremity, and lower extremity. The period of the award was for 12.00 weeks from April 28, 2015.

On March 25, 2016 appellant appealed to the Board. By decision dated January 4, 2017, the Board remanded the case for further development. The Board found that DMA Dr. Harris

had not explained why a motor deficit rating for the C6 and L5 nerve roots were inappropriate. As the Board noted, Dr. Hernandez Ortiz had found a motor deficit permanent impairment under *The Guides Newsletter*.

In a January 23, 2017 memorandum, OWCP requested that DMA Dr. Harris provide an additional report. The memorandum indicated, *inter alia*, that no explanation had been provided as to why a motor deficit rating under *The Guides Newsletter* was inappropriate for the C6 and L5 nerve roots.

By report dated January 25, 2017, DMA Dr. Harris opined that appellant had no permanent impairment to any extremity based on the September 22, 2015 report from Dr. Rojas, the second opinion physician. He did not address the evidence from Dr. Hernandez Ortiz or discuss a motor deficit.

By decision dated February 10, 2017, OWCP found that appellant was not entitled to an additional schedule award. It found the January 25, 2017 report from Dr. Harris represented the weight of the medical evidence.³

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ Neither FECA⁵ nor its implementing regulations⁶ specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁸

ANALYSIS

The Board finds that this case is not in posture for decision. As the Board explained in the prior decision, OWCP had not based the schedule award decision on the September 22, 2015

³ In addition, OWCP noted that a decision regarding an overpayment would be issued separately.

⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ *Id.*

⁶ 20 C.F.R. § 10.404.

⁷ A. George Lampo, 45 ECAB 441 (1994).

⁸ 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).

report from the second opinion physician, Dr. Rojas. The Board found that, as indicated by a medical adviser, Dr. Magliato, the report from Dr. Rojas provided little explanation or rationale for the conclusions provided.

The January 19, 2016 schedule award was based on the findings of attending physician Dr. Hernandez Ortiz. In this regard the Board remanded the case to OWCP for Dr. Harris to clarify a specific issue regarding appellant's motor deficit. Dr. Hernandez Ortiz had found a motor deficit under *The Guides Newsletter* based on his examination. Dr. Harris did not explain why he did not find a permanent impairment based on motor deficit for the C6 and L5 nerve roots.

The Board finds that the January 25, 2017 report from Dr. Harris does not sufficiently explain why his impairment rating changed from the one percent permanent impairment each for the left and right upper and lower extremities that he found in his January 8, 2017 report. Furthermore, his January 25, 2017 report lacks any explanation of how the A.M.A., *Guides* or *The Guides Newsletter* were used to calculate his finding of zero percent permanent impairment.⁹ Dr. Harris did not discuss a motor deficit and apparently reviewed only the report from Dr. Rojas. As discussed, this report was found to be of no probative value as to permanent impairment. Dr. Harris provided no explanation as to why the report should now be used to evaluate permanent impairment. Neither the Board's prior decision, nor the January 23, 2017 OWCP memorandum issued pursuant to the Board decision, directed Dr. Harris to review the September 22, 2015 report from Dr. Rojas.

It is well established that proceedings under FECA are not adversarial in nature and that while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.¹⁰ The Board finds that OWCP undertook development of the medical aspect of appellant's schedule award claim, but failed to obtain a medical opinion that resolved the issue identified by the Board regarding the rating of appellant's motor deficit.¹¹

The case will be remanded to properly resolve the permanent impairment issue.¹² If Dr. Harris is unable to provide an opinion as to a motor deficit based on the findings of Dr. Hernandez Ortiz, OWCP should further develop the evidence as necessary to resolve the issue. After such further development, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

⁹ See *G.N.*, Docket No. 10-0850 (issued November 12, 2010).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ See *S.K.*, Docket No. 16-0273 (issued July 14, 2016).

¹² OWCP should not develop any overpayment issue until the permanent impairment determination is properly made.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 10, 2017 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 13, 2017
Washington, DC

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

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

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