

On May 1, 1980 appellant, then a 42-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that, on April 30, 1980, he fell off of a bench, resulting in low back pain and leg pain. OWCP accepted appellant's claim under File No. xxxxxx252 for acute low back strain. Appellant was disabled from work due to this injury from April 30 through November 13, 1980. He returned to work on November 14, 1980. Appellant also filed a separate claim alleging that on August 4, 1987 he sustained an acute low back strain when he slipped and fell. OWCP accepted his claim under File No. xxxxxx406 for acute low back strain. Appellant was disabled due to the August 4, 1987 injury intermittently from August 6, 1987 until he returned to light duty on April 18, 1988. He again became disabled from work on June 2, 1988. OWCP administratively combined the two cases under File No. xxxxxx406. Appellant also had nonwork-related conditions of preexisting congenital scoliosis, foraminal stenosis and spondylolisthesis.

On September 9, 2005 appellant filed a claim for a schedule award (Form CA-7).

In a September 27, 2005 report, Dr. Laurence M. McKinley, appellant's Board-certified orthopedic surgeon, related that appellant had 10 percent permanent whole body impairment due to the accepted employment injuries.

In a November 16, 2005 opinion, an OWCP medical adviser reported that appellant's accepted conditions, including lumbosacral strain and compression fractures, did not cause neuralgic deficit in either lower extremity. He determined that, although appellant did have limited range of motion, there was no documentation of any neurologic deficit in either lower extremity. As such, the medical adviser determined that appellant had zero percent permanent impairment of his lower extremities resulting from the accepted work injuries.

By decision dated November 28, 2005, OWCP denied appellant's schedule award claim. It determined that the medical evidence of record did not support permanent impairment of a scheduled member or function of the body as required under 5 U.S.C. § 8107.

On December 6, 2005 appellant requested a hearing before an OWCP hearing representative. On November 30, 2006 OWCP's hearing representative set aside the November 28, 2005 decision and remanded the case for further development of the medical evidence. The hearing representative noted that the evidence of record was contradictory as to what conditions had preexisted the accepted injuries, what conditions had actually been accepted by OWCP, and what conditions were related to the accepted injury.

In a February 14, 2007 report, Dr. Hendrick J. Arnold, an orthopedic surgeon, conducted a second opinion evaluation for OWCP. He found that appellant had no physical findings in his lower extremities that were ratable for permanent impairment, but that appellant had permanent aggravations of underlying spinal stenosis, scoliosis, and degenerative disc disease.

By decision dated February 21, 2007, OWCP denied appellant's claim for a schedule award, but accepted the additional conditions of permanent aggravation of preexisting spinal stenosis, lumbar scoliosis, and degenerative disc disease.

On March 23, 2007 appellant requested a hearing before an OWCP hearing representative. In an August 8, 2007 decision, an OWCP hearing representative set aside the February 21, 2007 decision. She found a conflict in the medical opinion evidence between

Dr. McKinley and Dr. Arnold regarding whether appellant had sustained a ratable impairment to either of his lower extremities as a result of the accepted work-related conditions, and remanded the case for referral to a referee physician.

On remand OWCP referred appellant to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical opinion. Dr. Sabin, in a December 17, 2007 report, opined that appellant had no lower extremity impairment because his scoliosis and stenosis conditions were degenerative in nature and would worsen with aging.

By decision dated January 18, 2008, OWCP denied appellant's claim for a schedule award for his lower extremities based on the report of Dr. Sabin.

On January 31, 2008 appellant requested a review of the written record by an OWCP hearing representative. On May 14, 2008 OWCP's hearing representative set aside the January 18, 2008 decision and on remand directed OWCP to obtain a supplemental report from Dr. Sabin after advising him that impairment of an extremity caused by an accepted back condition can be the basis for an award.

In a supplemental report dated May 23, 2008, Dr. Sabin opined that there could not be a permanent aggravation of stenosis, scoliosis, and degenerative disc disease, only a temporary aggravation and that the acceptance by OWCP of such permanent aggravation was flawed. He noted that, even if this aggravation was accepted, it would still not relate to lower extremity impairment.

By decision dated September 12, 2008, OWCP denied appellant's schedule award claim, finding that the weight of the medical evidence of record, as represented by the report of Dr. Sabin, established that appellant did not have a lower extremity impairment causally related to his accepted condition.

On October 9, 2008 appellant again requested review of the written record by an OWCP hearing representative. By decision dated March 18, 2009, OWCP's hearing representative affirmed the September 12, 2008 decision.

Appellant appealed to the Board. By decision dated March 15, 2010, the Board determined that the report of Dr. Sabin was deficient in that he failed to properly comply with OWCP's hearing representative's instructions. The Board further noted that OWCP failed to refer the medical evidence to an OWCP medical adviser and that appellant should have been referred to an impartial medical specialist for an independent evaluation of his left and right lower extremity impairment based on correct application of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and the statement of accepted facts.⁴

On April 20, 2010 OWCP referred appellant to Dr. John Douthit, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 10, 2010 report, Dr. Douthit

³ (6th ed. 2009).

⁴ *Id.*

opined that appellant had no evidence of radiculopathy with no reflex loss, weakness, pain, or atrophy and normal parameters for range of motion of all joints. He noted his agreement with Drs. Arnold and Sabin in that he found no abnormal physical findings of appellant's lower extremities on which to base a rating. Dr. Douthit noted that he could not find any gait disturbances caused by an injury or impairment of his lower extremities. He noted that appellant's posture and gait were due to his back condition as other examiners had emphasized his injury was to the back. Dr. Douthit indicated that the lower extremity impairment would in most cases be accounted for in the spine impairment rating assuming that there are no other primary lower extremity diagnosed requiring concomitant rating. He concluded that he found no objective impairment of his lower extremities but would offer to rate his spine condition.

By decision dated May 20, 2010, OWCP denied appellant's schedule award claim based on the opinion of Dr. Douthit.

On June 9, 2010 appellant requested an oral hearing before an OWCP hearing representative. On October 22, 2010 an OWCP hearing representative granted appellant's request to withdraw his request for a hearing.

The case lay dormant until on September 9 and 17, 2014 when appellant filed a claim for an additional schedule award (Form CA-7).

Appellant submitted multiple progress reports from Dr. Daniel Barba, his treating Board-certified orthopedic surgeon. In a report dated October 14, 2014, Dr. Barba related that appellant indicated that his low back pain had plateaued and that he otherwise denied any radiating leg pain, numbness, tingling, or weakness. He diagnosed lumbar degenerative scoliosis and healed L1 vertebral body compression fracture clinically stable with no exacerbation in his chronic pain complaints.

On March 17, 2015 OWCP referred appellant to Dr. Thomas P. Moore, a Board-certified orthopedic surgeon, for a second opinion examination. In an April 2, 2015 opinion, Dr. Moore listed appellant's diagnoses as low back pain, idiopathic scoliosis, degeneration of lumbar spine and intervertebral discs, and spinal stenosis. He noted that appellant's scoliosis existed prior to his injury and did not result in any restrictions. Dr. Moore indicated that appellant was at maximum medical improvement (MMI) with regard to his back. He noted that appellant's impairment to his legs was not directly related to his work injuries, but rather secondary to appellant's spinal stenosis. Dr. Moore indicated that it was probably the result of natural aging and underlying degenerative changes of his lumbar spine.

On May 14, 2015 OWCP referred appellant's case to OWCP's medical adviser. In a May 16, 2015 response, the medical adviser concluded that, with lack of lower extremity sensory and motor deficits, appellant did not have lower extremity permanent impairment, for which he would be entitled to a schedule award.

By decision dated June 2, 2015, OWCP denied appellant's schedule award claim. It noted that his treating physician and the second opinion physician were in agreement that no impairment existed to appellant's lower extremity as a result of his employment-related injuries.

On August 17, 2015 appellant requested reconsideration. In an accompanying letter, he requested an impartial medical evaluation. Appellant alleged that Dr. Barba was more concerned

with the number of patients he saw and not with the issues he presented to him as a patient. He alleged that he told Dr. Barba that the pain had severely increased in his back and down his legs. Dr. Barba argued that he did not have a proper diagnosis and was requesting proper tests.

By decision dated November 9, 2015, OWCP denied modification of its prior decision. It noted that appellant requested another medical opinion, but indicated that as there was no conflict, a referee examination or a new second opinion were not warranted.

On February 12, 2016 appellant again requested reconsideration. In an accompanying letter, he questioned how Dr. Barba or Dr. Moore could make a qualified diagnosis and provide reliable reports when he had not undergone x-ray evaluation for over four years. Appellant alleged that his condition continued to worsen. He again requested another impartial examination with an orthopedic surgeon and asked that OWCP authorize further objective diagnostic testing.

By letter dated August 18, 2016, OWCP referred appellant to Dr. William V. Watson, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated November 30, 2016, Dr. Watson noted that appellant's claim had been accepted for aggravation of preexisting spinal stenosis. He also believed that the compression fracture at L1 was directly related to the original injury. However, Dr. Watson noted that appellant's idiopathic scoliosis was preexisting, although the injury did cause an aggravation. He believed that the aggravation of his preexisting curvature with continued evidence of his healed L1 compression fracture and x-ray evidence of scoliosis and spinal stenosis reached MMI on October 14, 2014 and that his condition has plateaued. Dr. Watson noted that, as of the date of his examination, appellant had no complaints of physical findings relating to the lower extremities. He believed that further medical care should be taken outside the realm of workers' compensation.

By decision dated November 3, 2016, OWCP denied modification of its prior decision. It determined that the requirements had not been met to establish entitlement to a schedule award because the weight of the medical opinion in the case established that appellant did not have a ratable impairment under 5 U.S.C. § 8107 and 20 C.F.R. § 10.404.

In August 23, 2016 x-ray report, Dr. Daniel Wardrop, a Board-certified radiologist, found levoscoliosis, advanced multi-level disc degeneration, and advanced facet osteoarthritis, resulting in significant neural foraminal stenosis at L3-4, L4-5, and L5-S1.

On April 12, 2017 appellant again requested reconsideration. In support thereof, he submitted a report by a physician assistant, Stephanie Marie Pierce, diagnosing low back pain, spinal stenosis in lumbar region, and spondylosis without myelopathy or radiculopathy, lumbar region. Appellant also submitted reports by Dr. Leek, noting that he gave appellant epidural injections from November 11 through 23, 2016. In a November 3, 2016 report, Dr. Leek diagnosed spinal stenosis lumbar region; radiculopathy lumbar region; spondylosis, lumbar region; and spondylolisthesis, lumbar region.

By decision dated June 14, 2017, OWCP denied modification of its November 2, 2016 decision because the preponderance of the medical evidence found that any impairment appellant was experiencing was the result of his degenerative condition and the aging process rather than the accepted work injuries.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁷ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁹ Neither FECA nor the implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine or the body as a whole; a claimant is not entitled to such a schedule award.¹⁰ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹¹ A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.¹²

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July/August 2009 *The Guides Newsletter*.¹³ It was designed for situation in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹⁴ The Board has recognized the adoption of this methodology as proper in order to provide a

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹¹ 5 U.S.C. § 8101(19).

¹² *W.D.*, Docket No. 10-274 (issued September 3, 2016).

¹³ The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

¹⁴ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁵

ANALYSIS

OWCP accepted appellant's claims for low back strain (from both the April 30, 1980 and August 8, 1987 employment injuries); and permanent aggravation of a preexisting spinal stenosis, lumbar scoliosis, and degenerative lumbar disc disease (from the August 4, 1987 injury).

The Board finds that appellant has failed to establish permanent impairment of a scheduled member or function of the body warranting a schedule award. As previously noted, no schedule award is payable for permanent loss of use of the back, spine or body as a whole, but, appellant may receive a schedule award for permanent impairment to the upper or lower extremities even though the cause of impairment originated in the spine.¹⁶

However, appellant failed to establish permanent impairment to his lower extremities due to his accepted back condition. No physician provided an opinion that appellant had a permanent impairment of his lower extremities. Dr. McKinley determined that appellant had no neurologic deficit in either lower extremity. Dr. Arnold, who conducted a second opinion examination on February 14, 2007, found that appellant had no physical findings in his lower extremities that would establish permanent impairment. Although Dr. Sabin conducted an impartial medical examination, Dr. Sabin's report was found deficient by this Board. Therefore, appellant was referred to Dr. Douthit for a new impartial medical examination. Dr. Douthit found no objective impairment in appellant's lower extremities. Dr. Moore conducted a second opinion evaluation on April 2, 2015, and determined that any impairment in appellant's legs was not directly related to his employment injury, but probably the result of natural aging and underlying degenerative changes in the lumbar spine. Dr. Watson, who conducted a second opinion examination on November 30, 2016, noted that appellant had no complaints of physical findings in his lower extremities. In addition, none of OWCP's medical advisers found any impairment in appellant's lower extremities.

Dr. Wardrop interpreted x-rays, but he did not reach any opinion with regard to permanent impairment of the lower extremities. Therefore, his report is of no probative value.¹⁷ Dr. Leek and Dr. Barba also did not address whether appellant had any permanent impairment of the lower extremities. Medical reports which do not address the issue of permanent impairment are irrelevant in a schedule award claim.¹⁸

Appellant also submitted evidence from Ms. Pierce, a physician assistant. However, physician assistants are not considered physicians under FECA, and therefore her opinion is of

¹⁵ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁶ *J.S.*, Docket No. 13-2129 (issued June 6, 2014).

¹⁷ *G.M.*, Docket No. 14-2057 (issued May 12, 2015).

¹⁸ *See J.D.*, Docket NO. 17-0767 (issued November 28, 2017).

no probative value.¹⁹ The Board, therefore, finds that appellant has not established his entitlement to a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure or medical evidence showing a progression of an employment-related condition resulting in impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lower extremities for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2017 is affirmed.

Issued: February 21, 2018
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

¹⁹ 5 U.S.C. § 8101(2) provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *L.L.*, Docket No. 13-829 (issued August 20, 2013) (a physician assistant is not a physician under FECA). *See* 5 U.S.C. § 8101(2).