

FACTUAL HISTORY

On September 27, 2001 appellant, then a 54-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that, on August 30, 2001, he sustained an injury when he was lifting a large bag of soil to throw into a dumpster and twisted his body. By decision dated June 5, 2002, OWCP accepted the claim for back sprain. It later expanded acceptance of the claim to include lumbar intervertebral disc disorder with myelopathy.

On June 6, 2002 appellant underwent L5-S1 laminectomy and discectomy which was authorized by OWCP. The preoperative diagnosis was noted as left-sided disc herniation at L5-S1. Appellant received leave buy back for intermittent time off from September 2, 2001 through August 4, 2002.

On November 7, 2002 appellant filed a claim for a schedule award (Form CA-7). The form was not fully completed by the employing establishment until July 2, 2004.

On October 8, 2003 OWCP received a November 6, 2002 attending physician's report (Form CA-20) from Dr. J. Michael Simpson, appellant's treating physician. Dr. Simpson reported that appellant underwent a lumbar laminectomy and opined that he had reached maximum medical improvement (MMI).

By letter dated October 23, 2003, OWCP notified appellant that no action could be taken on his schedule award claim until he submitted additional medical evidence evidencing a permanent impairment.

By letter dated July 11, 2005, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). It also requested that the attending physician determine whether MMI had been reached. OWCP afforded appellant 30 days to submit the requested information and provide an accompanying OWCP Form 1303-09 which could be used as a guide for his physician's impairment rating.

In an August 15, 2005 medical report, Dr. Simpson diagnosed lumbar pain with left-sided radicular symptoms, status post lumbar discectomy in 2002. He reported that he was unable to complete the requested form regarding loss of function or percentage of permanent impairment.

On June 4, 2010 OWCP received a June 16, 2009 report from Dr. William K. Fleming, a Board-certified orthopedic surgeon, who reported that he could not provide an impairment rating without neurological records and all of appellant's treatment records.

The case laid dormant until OWCP, by letter dated June 19, 2015, requested that appellant submit an impairment evaluation from his attending physician in accordance with the sixth edition of the A.M.A., *Guides*.² It requested that the physician determine a date of MMI and afforded appellant 30 days to submit the requested information.

² A.M.A., *Guides* (6th ed. 2009).

In support of his schedule award claim, appellant submitted an August 26, 2015 impairment evaluation from Dr. Fleming. Dr. Fleming reported that appellant had reached MMI in 2009. He provided physical examination findings and diagnosed chronic back pain and L5-S1 radiculopathy. Using the Spine Impairment Evaluation Process on page 380 of the fifth edition of the A.M.A., *Guides*, Dr. Fleming opined that appellant sustained 13 percent permanent impairment of the whole person from lumbar category 3. He reported a history of herniated disc, objective clinical findings associated with radiculopathy, surgery for radiculopathy, and somewhat symptomatic in support of his impairment rating.

On January 6, 2016 OWCP routed Dr. Fleming's report, a statement of accepted facts (SOAF), and the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

In a January 7, 2016 medical report, Dr. Harris reported that, although Dr. Fleming opined that appellant's MMI occurred in 2009, he did not review any medical reports which established this date. As such, he determined that MMI was reached on August 26, 2015, the date of Dr. Fleming's examination. Dr. Harris utilized *The Guides Newsletter* to calculate appellant's lower extremity impairment. He determined that appellant had one percent permanent impairment of the left lower extremity for residual problems with mild pain/impaired sensation from left S1 lumbar radiculopathy. Dr. Harris indicated that there was three percent permanent impairment of the left lower extremity for residual problems with mild motor weakness from left S1 lumbar radiculopathy. He combined these values to calculate four percent permanent impairment of the left lower extremity. Dr. Harris further determined that appellant sustained no permanent impairment of the right lower extremity. The DMA disagreed with Dr. Fleming's impairment rating, explaining that the physician calculated his rating based on mechanical low back pain, radiculopathy, and documented spinal pathology on diagnostic studies. Dr. Harris further explained that FECA only allowed schedule awards for the loss of use/impairments in the lower extremities, and not for spinal pain as determined by Dr. Fleming.

By decision dated July 7, 2016, OWCP granted appellant a schedule award for four percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The date of MMI was noted as August 26, 2015. The award covered a period of 11.52 weeks from August 26 to November 14, 2015. OWCP noted that the percentage of impairment was based on the report of Dr. Harris, serving as an OWCP DMA.

On August 4, 2016 appellant requested an oral hearing before an OWCP hearing representative.

A hearing was held on March 16, 2017. Appellant argued that he initially filed a schedule award on November 7, 2002 and was instructed to submit an impairment rating using the fifth edition of the A.M.A., *Guides*. He stated that he could not get a physician to provide impairment rating and it took so long to receive his schedule award that the A.M.A., *Guides* had been revised in the sixth edition. Appellant argued that his claim should be considered under the fifth edition based on when he first filed his claim and the November 6, 2002 Form CA-20

establishing MMI. OWCP's hearing representative advised him of the medical evidence needed in support of his claim and held the record open for 30 days.

By decision dated May 30, 2017, OWCP's hearing representative affirmed the July 7, 2016 schedule award decision, finding that appellant was properly awarded four percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The decision further found that appellant had not submitted an impairment rating from his physician until 2015 and OWCP properly calculated his award based on the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

LEGAL PRECEDENT

The schedule award provisions of FECA,³ and its implementing federal regulations,⁴ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.⁷ The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.⁸

ANALYSIS

The Board finds that appellant has not submitted sufficient evidence to establish that, as a result of his employment injury, he sustained more than the zero percent of the right lower extremity and four percent permanent impairment of the left lower extremity previously awarded.⁹

In support of his claim, appellant submitted an August 26, 2015 impairment evaluation from Dr. Fleming who opined that MMI had been reached in 2009. Using the Spine Impairment

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *Veronica Williams*, 56 ECAB 367 (2005); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁸ *Michael S. Mina*, 57 ECAB 379 (2006).

⁹ *W.R.*, Docket No. 13-0492 (issued June 26, 2013).

Evaluation Process on page 380 of the fifth edition of the A.M.A., *Guides*, Dr. Fleming opined that appellant sustained 13 percent permanent impairment of the whole person. The Board notes that his report does not provide support for a schedule award. There is no statutory basis for the payment of a schedule award for whole body impairment under FECA.¹⁰

Moreover, FECA does not provide for a schedule award for the spine.¹¹ However, impairment of a scheduled member of the upper or lower extremities is payable under FECA, if it originates from the spine.¹² The approach of rating impairment of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables as outlined in a July/August 2009 edition of *The Guides Newsletter*.¹³ The Board notes that Dr. Fleming did not reference or provide an evaluation in accordance with the July/August 2009 *The Guides Newsletter*.¹⁴ Since Dr. Fleming did not rate appellant's impairment pursuant to *The Guides Newsletter*, his rating is insufficient to establish that appellant is entitled to a schedule award of the lower extremities due to the accepted lumbar injuries.¹⁵

Dr. Harris, serving as an OWCP DMA, reviewed the SOAF along with Dr. Fleming's report and properly calculated appellant's impairment rating in accordance with the A.M.A., *Guides* and *The Guides Newsletter*.¹⁶ The Board finds that Dr. Fleming's report is thorough and well rationalized as he provided support for his findings.¹⁷ With respect to the left lower extremity, Dr. Fleming explained that appellant had one percent permanent impairment for residual problems with mild pain/impaired sensation from left S1 lumbar radiculopathy and three percent permanent impairment for residual problems with mild motor weakness from left S1 lumbar radiculopathy, resulting in a combined four percent permanent impairment of the left lower extremity. The DMA further determined that appellant sustained no impairment to the right lower extremity. FECA does not allow for permanent impairment ratings of the back without evidence of extremity impairment.¹⁸ Thus, the Board finds that OWCP properly determined that appellant was entitled to no more than the zero percent permanent impairment of

¹⁰ K.S., Docket No. 15-1082 (issued April 18, 2017).

¹¹ W.D., Docket No. 10-0274 (issued September 3, 2010).

¹² K.H., Docket No. 09-0341 (issued December 30, 2009).

¹³ See G.N., Docket No. 10-0850 (issued November 12, 2010); see also *supra* note 5 at Chapter 3.700, Exhibit 1, note 9 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ J.C., Docket No. 15-1780 (issued March 17, 2016).

¹⁵ E.D., Docket No. 10-0967 (issued January 7, 2011).

¹⁶ *Id.*

¹⁷ L.W., Docket No. 12-1613 (issued February 19, 2013).

¹⁸ *Supra* note 12.

the right lower extremity and four percent permanent impairment of the left lower extremity previously awarded.¹⁹

Appellant alleges that his permanent impairment should have been evaluated under the fifth edition of the A.M.A., *Guides*. In *Harry D. Butler*,²⁰ the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.²¹ On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.²² Appellant argues that the fifth edition should be used because his schedule award claim was first filed on November 7, 2002 and Dr. Simpson's Form CA-20 established MMI on November 6, 2002.²³ The Board notes that the applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of MMI or when the claim for such award was filed. As Dr. Fleming failed to utilize the sixth edition of the A.M.A., *Guides*, his opinion is of no probative value.

On appeal, appellant argues that the schedule award does not reflect the time frame of MMI in 2009 when he was forced to retire. He further argues that he actually reached MMI on August 5, 2002. The Board notes that subsequent medical reports submitted did not indicate that a fixed and permanent state had been reached. Moreover, Dr. Harris reviewed the medical evidence of record and did not find support for MMI having been reached in 2009. As such, OWCP properly determined that the date of MMI was August 26, 2015, the date of Dr. Fleming's most recent medical examination.²⁴

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.

¹⁹ *M.J.*, Docket No. 13-0598 (issued May 8, 2013).

²⁰ 43 ECAB 859 (1992).

²¹ *Id.* at 866.

²² FECA Bulletin No. 09-0003 (March 15, 2009). FECA Bulletin was incorporated in *supra* note 5 at Chapter 2.808.5(a) (February 2013).

²³ The Board also notes that Dr. Simpson's November 6, 2002 Form CA-20 failed to provide any information pertaining to an impairment rating such that a schedule award determination could be made when appellant first filed his claim. *L.F.*, Docket No. 10-0343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

²⁴ *A.T.*, Docket No. 13-1908 (issued May 23, 2014).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than zero percent permanent impairment of his right lower extremity and four percent permanent impairment of his left lower extremity for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 30, 2017 is affirmed.

Issued: February 12, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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