



## ISSUE

The issue is whether appellant has more than zero percent permanent impairment of the left lower extremity, and, more than two percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On September 21, 2012 appellant, then a 49-year-old manual distribution clerk, filed an occupational disease claim (Form CA-2) alleging that on July 13, 2012 she first suffered lower lumbar and thoracic back pain extending into her legs, and first related the pain to factors of her federal employment on July 16, 2012. She stopped work on July 13, 2012. OWCP accepted appellant's claim for aggravation of preexisting lumbar spinal stenosis, preexisting left L4-5 synovial cyst, and preexisting L4-5 and L5-S1 degenerative disc disease. Appellant received wage-loss compensation and medical benefits on the periodic rolls effective November 16, 2013.

On May 6, 2014 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as it found she no longer had any disability or residuals due to her accepted conditions. By decision dated July 31, 2014, it finalized the proposed termination effective that date. Counsel requested a hearing before an OWCP hearing representative on August 7, 2014. On February 20, 2015 the hearing representative affirmed the July 31, 2014 termination decision.

In a June 12, 2015 report, Dr. Arthur Becan, a Board-certified orthopedic surgeon, discussed appellant's medical history, provided findings on physical examination, and noted review of diagnostic testing. He diagnosed cumulative and repetitive trauma disorder, L4-5 and L5-S1 herniated discs, chronic lumbosacral strain and sprain, L4-5 and L5-S1 foraminal stenosis, and occupational low back syndrome. Based on appellant's moderate L5 motor strength deficit right extensor hallucis longus, he calculated 13 percent permanent impairment of the right lower extremity pursuant to Table 2 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) *The Guides Newsletter*.<sup>3</sup> Dr. Becan calculated an additional six percent permanent impairment of the right lower extremity based on severe sensory deficit right L5 nerve root. Next, he calculated an additional three percent permanent impairment of the right lower extremity based on mild S1 motor deficit right gastrocnemius. Dr. Becan also calculated an additional four percent permanent impairment of the right lower extremity based on severe sensory deficit right S1 nerve root.

Regarding appellant's left lower extremity, based on his mild L5 motor strength deficit left extensor hallucis longus, Dr. Becan calculated five percent permanent impairment of the left lower extremity. He calculated an additional six percent permanent impairment of the left lower extremity based on severe sensory deficit right L5 nerve root. Next, Dr. Becan calculated an additional three percent permanent impairment of the left lower extremity based on mild S1 motor deficit right gastrocnemius. He also calculated an additional four percent permanent impairment of the left lower extremity based on severe sensory deficit right S1 nerve root.

---

<sup>3</sup> *The Guides Newsletter*, July/August 2009.

Dr. Becan concluded that appellant had reached maximum medical improvement (MMI) on June 12, 2015 and was entitled to a schedule award for a final combined 23 percent permanent impairment of the right lower extremity and 18 percent permanent impairment of the left lower extremity.

On September 30, 2015 appellant filed a claim for a schedule award (Form CA-7).

On October 19, 2015 an OWCP district medical adviser (DMA) reviewed Dr. Becan's report and recommended a referral for a second opinion evaluation.

On January 8, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a permanent impairment evaluation of her bilateral lower extremities for purposes of a schedule award.

In a report dated February 8, 2016, after Dr. Hanley noted appellant's history of injury, and his review of appellant's medical record, he presented his examination findings. His examination findings included negative straight leg testing, no atrophy, and no weakness of either leg. According to Dr. Hanley, appellant's complaint of numbness in her legs was a nondermatomal description. He reported no objective evidence of lower extremity lumbar radiculopathy. Dr. Hanley observed that appellant's subjective complaints of leg pain did not correlate with the objective evidence. He concluded that appellant had zero percent permanent impairment of both lower extremities relative to her accepted July 13, 2012 employment injury.

On July 5, 2016 OWCP referred appellant to Dr. Andrew Gelman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Hanley and Dr. Becan on the issue of extent of, if any, permanent impairment of either lower extremity due to her accepted employment conditions.

In a report dated August 2, 2016, Dr. Gelman explained the impact of the July/August 2009 edition of *The Guides Newsletter* and found appellant had two percent permanent impairment of her right lower extremity and zero percent permanent impairment of her left lower extremity. He related that appellant's physical examination findings included a gait without antalgia, mild physiologic hyper lumbar lordosis, normal lower extremity strength testing, decreased right lateral calf pin sensation, positive straight right leg raising with equivocal Lasegue's, intact sensation with decreased right lateral calf pin sensation, and negative left straight leg raising. Dr. Gelman explained that appellant had no left lower extremity permanent impairment due to absence of any subjective complaints, motor and/or sensory involvement. With respect to the right lower extremity he observed normal and full motor grade resistance testing and mild subjective right L5 dermatome sensory asymmetry. Dr. Gelman placed appellant in a class 1 for mild L5 subjective sensory asymmetry using Proposed Table 2 of the July/August 2009 *The Guides Newsletter*. Applying the net adjustments from functional history,<sup>4</sup> clinical studies,<sup>5</sup> and physical examination,<sup>6</sup> Dr. Gelman reached a net adjusted grade

---

<sup>4</sup> A.M.A., *Guides* 575, Table 17-6.

<sup>5</sup> *Id.* at 576, Table 17-7.

<sup>6</sup> *Id.* at 581, Table 17-9.

modifier of + 1, which moved the percent default to D, resulting in a rating of two percent permanent impairment of the right lower extremity.

OWCP referred Dr. Gelman's report to its DMA for the purpose of "[assuring] that the referee physician appropriately applied the A.M.A., *Guides* in calculating the impairment rating." In an October 14, 2016 report, a new DMA reviewed Dr. Gelman's report and found that he had correctly applied the A.M.A., *Guides* when he found zero percent permanent impairment of appellant's left lower extremity, and two percent permanent impairment of her right lower extremity.

By decision dated November 22, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of her right lower extremity. The period of the award was from August 2 to September 11, 2016.

In a letter dated December 1, 2016, appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on March 2, 2017.

By decision dated April 5, 2017, an OWCP hearing representative affirmed the November 22, 2016 schedule award determination. The hearing representative concluded that Dr. Gelman's opinion that appellant had two percent permanent impairment of the right lower extremity, and zero percent permanent impairment of the left lower extremity constituted the special weight of the medical opinion evidence.

### **LEGAL PRECEDENT**

Under section 8107 of FECA<sup>7</sup> and section 10.404 of the implementing federal regulations,<sup>8</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>9</sup>

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.<sup>10</sup> 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

---

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>10</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>11</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.<sup>12</sup> For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.<sup>13</sup> FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.<sup>14</sup>

Section 8123(a) of FECA provides in pertinent part: if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>15</sup> Where a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>16</sup>

### ANALYSIS

Appellant's claim was accepted for aggravation of preexisting lumbar spinal stenosis, preexisting left L4-5 synovial cyst, and preexisting L4-5 and L5-S1 degenerative disc disease. OWCP found that appellant no longer had disability or residuals of the accepted conditions as of July 31, 2014. By decision dated November 22, 2016, it granted appellant a schedule award for two percent permanent impairment of the right lower extremity, which was affirmed by an OWCP hearing representative in an April 5, 2017 decision. No award was made for left lower extremity permanent impairment.

The Board finds that appellant has not established more than two percent permanent impairment of the right lower extremity, for which she was previously granted a schedule award.

OWCP found a conflict existed between the medical opinions of Dr. Becan, appellant's physician, who opined that appellant had 24 percent right lower extremity permanent impairment and 18 percent left lower extremity permanent impairment, and Dr. Hanley, an OWCP referral physician, who opined that appellant had no permanent impairment of either lower extremity due

---

<sup>11</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

<sup>13</sup> See *G.N.*, Docket No. 10-0850 (issued November 12, 2010); see also *id.* at Chapter 3.700, Exhibit 1, n.9 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>14</sup> *Supra* note 12 at Chapter 2.808.5c(3) (February 2013).

<sup>15</sup> 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>16</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

to the accepted lumbar injury. Therefore, OWCP properly referred appellant to Dr. Gelman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence.<sup>17</sup>

Dr. Gelman provided a complete history and he reviewed in detail the medical evidence of record. He provided results on examination and based his opinion on a complete and accurate background. Dr. Gelman referred to *The Guides Newsletter*, and explained that appellant had an impairment of her right lower extremity due to her mild subjective right L5 dermatome sensory asymmetry. He properly explained that appellant had a net adjusted grade modifier of plus one, which moved default rating to a rating of two percent permanent impairment of the right lower extremity. Based on his examination and review of the record, Dr. Gelman properly concluded that appellant had two percent right lower extremity permanent impairment.

Regarding appellant's left lower extremity permanent impairment rating, Dr. Gelman related appellant's physical examination findings and explained that she had no left lower extremity permanent impairment due to absence of any subjective complaints, motor and/or sensory involvement.

On October 14, 2016 a new DMA reviewed and found that Dr. Gelman had correctly applied *The Guides Newsletter* when he found that appellant had two percent permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity permanent impairment.

The Board finds that Dr. Gelman's opinion is thorough and well rationalized, as the impartial medical examiner, and represents the special weight of the medical evidence.<sup>18</sup> The Board has carefully reviewed his reports and finds that his opinion has reliability, probative value, and convincing quality with respect to its conclusions regarding the extent of appellant's permanent impairment. Dr. Gelman's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.<sup>19</sup> He provided medical rationale for his opinion by explaining that, after careful review of all medical documentation and his clinical examination of appellant, the evidence established two percent right lower extremity permanent impairment. Dr. Gelman's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant has two percent right lower extremity permanent impairment.

On appeal counsel contends that Dr. Gelman's opinion cannot constitute the weight of the medical opinion evidence as he did not conduct sufficient motor and sensory testing. Contrary to counsel's contentions, Dr. Gelman noted results from his sensory and motor testing and explained his calculations with citations to the A.M.A., *Guides*. In addition, OWCP's DMA reviewed Dr. Gelman's report and concluded that he had properly used the A.M.A., *Guides* in his impairment rating.

---

<sup>17</sup> *Id.*

<sup>18</sup> *Barry Neutuch*, 54 ECAB 313 (2003).

<sup>19</sup> *See supra* note 16.

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.

**CONCLUSION**

The Board finds that appellant has not established entitlement to a schedule award for more than zero percent permanent impairment of the left lower extremity, and more than two percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 5, 2017 is affirmed.

Issued: February 22, 2018  
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