

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 56-year-old computer specialist, has an accepted occupational disease claim (Form CA-2) alleging for temporary aggravation of mild asthma and temporary aggravation of preexisting chronic low back pain, resolved December 21, 2006, under OWCP File No. xxxxxx017 due to inhaling asphalt fumes during a roof repair. She also has an accepted traumatic injury claim for a lumbar strain and a herniated disc at L4-5 under OWCP File No. xxxxxx023 due to a December 15, 1998 work injury when a box of books fell on her leg. Appellant stopped work on November 22, 2006 and then retired on July 31, 2007. OWCP granted her a schedule award for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity. Appellant appealed to the Board. On June 25, 2013 the Board remanded the case for OWCP to administratively combine her case files in order to determine whether OWCP properly adjudicated the issue of her schedule award claim.⁴ By decision dated August 19, 2013, OWCP denied modification of its prior schedule award decisions. Appellant appealed to the Board. By decision dated April 23, 2014, the Board affirmed OWCP's August 19, 2013 decision, finding that there was no probative medical evidence of record establishing that she was entitled to a schedule award greater than that previously received.⁵

On July 8, 2015 appellant filed a claim for an increased schedule award (Form CA-7).

In a July 16, 2015 letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional medical evidence and respond to its inquiries.

Subsequently, appellant submitted a July 30, 2015 report from Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, who diagnosed lumbar herniated disc and assigned a grade modifier of 4 for functional history, 3 for physical examination, and 3 for clinical studies. Dr. Chmell concluded that appellant had a class 2 diagnosis of intervertebral disc herniation, which equaled 14 percent permanent impairment of the left lower extremity and 14 percent permanent impairment of the right lower extremity under Table 17-4 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In an August 3, 2015 report, Dr. Chmell reiterated his impairment rating.

On August 20, 2015 Dr. Chmell reported that appellant was seen for an urgent appointment. He asserted that several days prior she had a sharp pain in her back such that her

³ Docket No. 13-1996 (issued April 23, 2014); Docket No. 13-0445 (issued June 25, 2013).

⁴ By letter dated July 30, 2013, OWCP notified appellant that her claim had been doubled and her new occupational disease claim under File No. xxxxxx017 was the master case file.

⁵ Docket No. 13-1996 (issued April 23, 2014).

⁶ A.M.A., *Guides* (6th ed. 2009).

legs gave out and she fell injuring her left wrist. Dr. Chmell diagnosed lumbar disc herniation, aggravation of degenerative disc disease of the lumbar spine, asthma, bilateral carpal tunnel syndrome with multiple tendinitis, cervical disc derangement, and fracture left wrist distal radius.

In an August 25, 2015 narrative statement, appellant indicated that she fell in her home on August 16, 2015 and fractured her left wrist. She stated that her leg gave way and this injury was due to her work-related back injury.

In two reports dated September 3, 2015, Dr. Chmell continued to diagnose left wrist fracture and opined that appellant's condition was causally related to her accepted employment-related conditions. He explained that the weakness at her ankles and feet was due to her work injury to her low back where she had lumbar disc herniation and the radiculopathy that she had in her legs had resulted in his weakness at her ankles and feet. Dr. Chmell concluded that this resulted in appellant's fall and left wrist fracture, which he advised that should be accepted as a consequential injury.

On September 17, 2015 Dr. Chmell reiterated his opinion that appellant's left wrist fracture was causally related to her accepted lumbar disc herniation condition. He noted that she had weakness and diminished sensation in both legs, ankles, and feet due to her lumbar disc herniation and also noted that she had started using a cane over the last year because of the weakness. Dr. Chmell also reiterated that appellant fell due to the weakness in her legs and, as was a normal reaction when falling, put her left hand out in front of herself when she fell. He opined that her left wrist fracture was caused by a fall due to the weakness in her legs, ankles, and feet and was therefore causally related to her accepted back condition.

In an October 8, 2015 report, Dr. Chmell reiterated his diagnoses and stated that appellant continued to experience low back pain and stiffness, radiating into her legs.

On October 30, 2015 Dr. Michael Hellman, an OWCP medical adviser, reviewed the evidence of record and found that Dr. Chmell agreed that no additional impairment should be awarded because he determined that appellant had 14 percent permanent impairment of the left lower extremity and she had previously received a schedule award for 15 percent permanent impairment of the left lower extremity.

By decision dated November 18, 2015, OWCP denied appellant's claim for an increased schedule award, indicating that she had previously received a schedule award for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity under File No. xxxxxx023 and the medical evidence did not support an increase in the impairment already compensated.

On January 11, 2016 appellant requested reconsideration and submitted reports dated December 17 and 30, 2015, and January 28 and February 27, 2016 from Dr. Chmell who diagnosed right elbow derangement and arthritis aggravation and reiterated his impairment rating, arguing that it was unfair and inappropriate to require a new methodology to determine her impairment rating using the July/August 2009 *The Guides Newsletter*.

By decision dated April 7, 2016, OWCP denied modification of its prior decision. It found FECA required a work-related spinal impairment to be rated under the sixth edition of the A.M.A.,

Guides, which included a supplemental publication of the July/August 2009 *The Guides Newsletter*, and Dr. Chmell had not provided objective findings to support an additional impairment above what had been previously awarded to appellant.

On May 2, 2016 appellant requested reconsideration and submitted reports dated March 31, May 5, June 9, July 29, and October 27, 2016 from Dr. Chmell reiterating his diagnoses and indicating that appellant continued to experience pain.

In an April 18, 2016 report, Dr. Chmell argued that OWCP's decision were erroneous because its medical advisers were residents in training to become orthopedic surgeons and therefore their opinions were of questionable probative value.

On July 15, 2016 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP's medical adviser, reviewed the medical evidence of record and found that Dr. Chmell's impairment rating was unacceptable for schedule award purposes because OWCP calculated lumbar spinal radiculopathy impairment according to *Proposed Table 2: Spinal Nerve Impairment: Lower Extremity Impairment*, as published in the July/August 2009 *The Guides Newsletter*, as it offered a more accurate determination of impairment for specific spinal nerves. He concluded that Dr. Chmell's impairment rating lacked probative value.

OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related impairment. In his December 27, 2016 report, Dr. Brecher reviewed her medical history, a statement of accepted facts, and conducted a physical examination. He found that appellant was neurologically intact. Appellant had some tenderness in her lower back. She had a negative straight-leg raise test and her motor and sensation were intact. Dr. Brecher found that appellant only had back pain, noting that she did "not have lower extremity problems." He determined that she had reached maximum medical improvement as of 2001. Dr. Brecher disagreed with Dr. Chmell's impairment rating because he did not find any lower extremity impairment upon physical examination. He noted that appellant's chronic back pain equated to a one percent whole person impairment rating under the sixth edition of the A.M.A., *Guides*.

Subsequently, appellant submitted reports dated December 22, 2016 and February 9, 2017 from Dr. Chmell who reiterated his diagnoses and opinions.

In a February 22, 2017 report, Dr. Katz reviewed Dr. Brecher's December 27, 2016 second opinion report and found that although he calculated whole person impairment rating of one percent on the basis of chronic back pain, a whole person impairment did not qualify for a schedule award. He concluded that appellant had zero percent permanent impairment of the bilateral lower extremities and her date of maximum medical improvement was December 13, 2016, the date of Dr. Brecher's examination.

By decision dated February 23, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁷ It, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹

Neither FECA nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹⁰ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹¹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.¹² It was designed for situations where 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 procedure manual.¹³

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.¹⁴ Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.¹⁵ If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.¹⁶ There are no provisions for

⁷ For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks compensation. 5 U.S.C. § 8107(c)(2).

⁸ 20 C.F.R. § 10.404.

⁹ 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).

¹⁰ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹¹ *Supra* note 8 at Chapter 2.808.5c(3).

¹² The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

¹³ See *supra* note 8 at Chapter 3.700, Exhibit 4.

¹⁴ *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

¹⁵ *Supra* note 8 at Chapter 2.808.5d.

¹⁶ *Id.*

apportionment under FECA,¹⁷ but when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁸

ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of mild asthma and temporary aggravation of preexisting chronic low back pain, resolved December 21, 2006, due to factors of her federal employment. It also accepted a lumbar strain and a herniated disc at L4-5 due to a December 15, 1998 employment injury. OWCP awarded her schedule awards for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity. It is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment.¹⁹

Appellant submitted reports from Dr. Chmell in support of her claim. Dr. Chmell opined that she had sustained 14 percent permanent impairment of the bilateral lower extremities. The Board finds that his reports failed to clearly explain how he calculated appellant's impairment under the sixth edition of the A.M.A., *Guides*. For example, Dr. Chmell did not note how he applied grade modifiers to particular diagnoses under specific tables in the A.M.A., *Guides*.²⁰ The Board has held that when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* or does not discuss how he arrives at the degree of impairment based on physical findings, his opinion is of diminished probative value in establishing the degree of impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.²¹ Thus, Dr. Chmell's reports are of diminished probative value regarding appellant's lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.²²

The Board finds that OWCP properly referred appellant to Dr. Brecher for a second opinion examination after finding that the impairment ratings of appellant's attending physician, Dr. Chmell failed to properly follow procedures for the calculation of permanent functional impairment. In his December 27, 2016 report, Dr. Brecher found that she had some tenderness in her lower back, but she was neurologically intact. Appellant had a negative straight-leg raise test and her motor and sensation were intact. Dr. Brecher found that she had back pain only and did not find any lower extremity impairment upon physical examination. He concluded that

¹⁷ *Id.*

¹⁸ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

¹⁹ See *Annette M. Dent*, 44 ECAB 403 (1993).

²⁰ A.M.A., *Guides* 411. See also *M.B.*, Docket No 12-361 (issued September 10, 2012).

²¹ See *John L. McClanic*, 48 ECAB 552 (1997); *L.M.*, Docket No. 12-0868 (issued September 4, 2012).

²² See *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

appellant's chronic back pain equated to a one percent whole person impairment rating under the sixth edition of the A.M.A., *Guides*.

In accordance with its procedures, OWCP properly referred the evidence of record to its OWCP medical adviser, Dr. Katz. In his July 15, 2016 report, Dr. Katz found that Dr. Chmell's impairment rating was unacceptable for schedule award purposes because OWCP calculated lumbar spinal radiculopathy impairment according to the July/August 2009 *The Guides Newsletter*, as it offered a more accurate determination of impairment for specific spinal nerves. In his February 22, 2017 report, Dr. Katz reviewed Dr. Brecher's December 27, 2016 second opinion report and found that although he calculated a one percent whole person impairment rating on the basis of chronic back pain, a whole person impairment did not qualify for a schedule award. He concluded that appellant had zero percent permanent impairment of the bilateral lower extremities and her date of maximum medical improvement was December 13, 2016, the date of Dr. Brecher's examination.

The Board finds that OWCP's medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Brecher's clinical findings. OWCP's medical adviser's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. The medical adviser explained that Dr. Brecher's assessment of one percent whole person impairment was not allowed for purposes of making schedule award decisions under FECA.²³ Therefore, OWCP properly relied on an OWCP medical adviser's assessment of a zero percent permanent impairment of the bilateral lower extremities, in denying an additional schedule award for the right and left lower extremities.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established that she is entitled to a schedule award greater than that previously awarded.

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 met her burden of proof to establish more than 30 percent permanent impairment of her right lower extremity and 15 percent permanent impairment of her left lower extremity, for which she previously received schedule awards.

²³ Neither FECA, nor its implementing regulations, provide for a schedule award for impairment to the body as a whole. See *James E. Mills*, 43 ECAB 215, 219 (1991); see also *N.C.*, Docket No. 14-1882 (issued March 3, 2015).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 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