

FACTUAL HISTORY

On August 17, 2005 appellant, then a 39-year-old supervisory deputy marshal, injured his low back when performing training exercises in the performance of duty. He did not stop work. OWCP accepted the claim for lumbar sprain/strain and later expanded acceptance of the claim to include displaced lumbar disc without myelopathy and aggravation of lumbar degenerative disc disease. Appellant underwent an authorized lumbar fusion on February 15, 2007.

An initial magnetic resonance imaging (MRI) scan of the lumbar spine on August 29, 2005 revealed mild generalized disc bulge with evidence of an annular tear at L5-S1 and desiccated intervertebral disc spaces at L4-5 and L5-S1. On February 15, 2007 Dr. Lloyd A. Youngblood, a Board-certified neurosurgeon, performed a decompressive laminectomy, partial medial facetectomy, foraminotomy, and nerve root decompression bilaterally at L4, L5, and S1 nerve roots; posterior lumbar interbody fusion; and microsurgical repair of dural defect at right L5. On April 5, 2007 Dr. Youngblood noted that appellant was doing well postoperatively. He noted residual L5 radiculopathy on the right, but his preoperative pain had largely resolved. Dr. Youngblood returned appellant to light-duty work on April 16, 2007, part time, four hours a day.²

Appellant was treated by Dr. Robert G. Johnson, a Board-certified neurosurgeon and associate of Dr. Youngblood, on September 3, 2009 and March 2, 2010, who noted appellant's surgery history and advised that appellant was doing well with only minimal neuritic pain in his right leg. On March 15, 2012 Dr. Johnson advised that appellant reported one episode of intense muscle spasm that had lasted five weeks, but had resolved. Appellant continued to cycle over 100 miles a week and perform core exercises. Dr. Johnson noted that appellant was neurologically intact and in good physical condition. March 15, 2012 lumbar spine x-rays showed stable postoperative changes.

On October 28, 2015 appellant filed a claim for a schedule award (Form CA-7). He submitted an undated impairment evaluation from Dr. Richard Radecki, a Board-certified physiatrist, which was based on a September 25, 2015 examination.³ Appellant presented with mild pain of the mid-back region in the lumbar area, some radiating pain into his legs, weakness, and left leg numbness. Dr. Radecki noted that appellant underwent fusion surgery without difficulties and was released back to full-time duty on July 10, 2007. He advised that appellant had reached maximum medical improvement (MMI). Dr. Radecki noted findings of no antalgic gait, negative straight leg raise in the seated position bilaterally, manual muscle testing of 5/5, no muscle atrophy, mild discomfort in the lumbar paraspinals bilaterally, intact transitional movements, intact sensation, and negative clonus, Babinski, and Romberg testing. He diagnosed status post multilevel fusion performed for degenerative disc changes and work-related injury. Dr. Radecki opined that appellant had six percent whole person impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,⁴ (A.M.A.,

² Appellant eventually returned to full duty. He did not claim wage-loss compensation.

³ No medical evidence was submitted to the record after the March 15, 2012 reports until Dr. Radecki's report.

⁴ A.M.A., *Guides* (6th ed. 2009).

Guides). He noted that pursuant to Table 17-6, appellant had a grade modifier 1 for descriptions of pain with strenuous or vigorous activity. For physical examination appellant had a grade modifier of zero and clinical studies grade modifier was not utilized as it was used to make the diagnosis. Dr. Radecki diagnosed alteration of multiple segment levels status postsurgery. He referenced Table 17-4, page 570 and indicated that using the lumbar spine regional grid system, appellant was a class 1 equal to single or multiple level medically documented findings with or without surgery resolution of radiculopathy or nonverifiable radicular pain at appropriate clinical levels. Dr. Radecki noted the default impairment was seven percent whole person. He advised that the neck grade modifier equalization would be -1 which yielded impairment of six percent whole person. Dr. Radecki opined that, under the A.M.A., *Guides*, appellant sustained six percent whole person impairment.

In a November 19, 2015 letter, OWCP advised Dr. Radecki that, under FECA, awards for permanent impairment may not be paid for the spine, but that awards could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. Therefore, if a work-related spinal nerve injury caused impairment to the extremities, he could render an impairment rating of the affected extremities by using the article entitled "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition," which was published in the July/August 2009 *The Guides Newsletter*, a supplemental publication of the A.M.A., *Guides*. OWCP requested a supplemental report based on the foregoing. No response was received from Dr. Radecki.

On September 8, 2016 an OWCP medical adviser reviewed Dr. Radecki's report. He noted that Dr. Radecki's examination did not demonstrate any neurologic deficit in either leg and that appellant had normal gait mechanics. The medical adviser indicated that Dr. Radecki calculated his impairment rating based on Table 17-4, page 570-74 of the A.M.A., *Guides* which provides whole person impairment for mechanical low back pain, radiculopathy, and documented spinal pathology on diagnostic studies including an MRI scan. However, OWCP and FECA provide schedule awards only for the loss of use/impairments in the lower extremities and not for spinal pain. The medical adviser noted appellant's diagnosed condition was status post posterior lumbar interbody fusion L4-S1 on February 15, 2007. He concluded that, under the A.M.A., *Guides*, appellant had no impairment of the lower extremities resulting from the accepted work injury of August 17, 2005. The date of MMI was noted as September 25, 2015, the date of Dr. Radecki's evaluation.

By decision dated September 14, 2016, OWCP denied appellant's claim for a schedule award. It found that the evidence of record did not establish that appellant sustained permanent impairment of a scheduled member due to his accepted injury. On September 19, 2016 OWCP's decision was returned to sender as undeliverable. On February 7, 2017 OWCP reissued the September 19, 2016 decision and mailed it to appellant's current address.

On March 6, 2017 appellant requested reconsideration. In a February 21, 2017 statement, he disagreed with the September 14, 2016 decision and requested reconsideration. Appellant asserted that the Social Security Administration allowed impairment consistent with his injury and that the A.M.A., *Guides* allowed ratings for whole person impairment. He asserted that, pursuant to the A.M.A., *Guides*, permanent impairments, including his back fusion, were to be rated. Appellant requested that an impairment rating be obtained from the physician who

performed his surgery. He also resubmitted OWCP's medical adviser's September 8, 2016 report and OWCP's September 14, 2016 decision.

By March 31, 2017 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸

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.⁹ A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.¹⁰ Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.¹¹

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 schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹²

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹² *Supra* note 10.

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) (hereinafter *The Guides Newsletter*) is to be applied.¹³ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹⁴ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a work-related sprain/strain of the lumbar region, displaced lumbar disc without myelopathy, and aggravation of lumbar degenerative disc disease. Appellant underwent a lumbar fusion on February 15, 2007. On October 28, 2015 he claimed a schedule award. OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled body member due to the accepted conditions.

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lower extremities due to his accepted employment injuries and, therefore, a schedule award is not warranted.

In support of his claim, appellant submitted a report from Dr. Radecki who found that appellant had six percent whole person permanent impairment under the sixth edition of the A.M.A., *Guides*. In making this determination, Dr. Radecki referenced Table 17-4 (Lumbar Spine Regional Grid) beginning on page 570. On November 19, 2015 OWCP advised Dr. Radecki that awards for permanent impairment could not be paid for the spine under FECA. It requested that he provide a calculation for any affected extremities pursuant to the July/August 2009 *The Guides Newsletter*. Dr. Radecki did not respond to this request.

Thereafter, OWCP referred the case for review by an OWCP medical adviser. Its procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁶

¹³ See *G.N.*, Docket No. 10-0850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

¹⁵ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

The Board finds that the medical adviser properly determined that appellant had no permanent impairment of his lower extremities under the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. In his September 8, 2016 report, the medical adviser properly indicated that Dr. Radecki's opinion on lower extremity impairment of the lumbar spine was deficient because he improperly applied the standards of Table 17-4¹⁷ to find lumbar spine impairment, rather than applying the standards of *The Guides Newsletter*. The Board has held that *The Guides Newsletter* provides the standards for evaluating any permanent impairment in the lower extremities referable from the lumbar spine.¹⁸ The medical adviser found no basis under *The Guides Newsletter* to rate impairment of either leg, noting that Dr. Radecki did not report any neurologic deficit in either leg, and that appellant had normal gait mechanics.

Because Dr. Radecki's impairment evaluation was not conducted in accordance with the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, it is of limited probative value and insufficient to establish that appellant has lower extremity impairment attributable to his accepted conditions.¹⁹ Appellant has not submitted probative medical evidence sufficient to establish lower extremity impairment under *The Guides Newsletter*. Thus a schedule award is not warranted.

On appeal appellant notes that Dr. Radecki submitted an impairment rating, but failed to mention that appellant developed lumbar spinal stenosis as a result of his back fusion. He noted experiencing ongoing leg symptoms requested a follow up visit with one of his physicians to confirm his symptoms and to obtain an impairment rating. As found, Dr. Radecki's opinion is of limited probative value as he did not follow *The Guides Newsletter*. In a letter dated November 19, 2015, OWCP requested that Dr. Radecki provide an impairment rating based on applicable tables found in *The Guides Newsletter*, but he did not respond to this request. This decision does not preclude appellant from obtaining additional medical evidence and further pursuing the matter.

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.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,²⁰ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may

¹⁷ See A.M.A., *Guides* 570, Table 17-4.

¹⁸ See *supra* note 13.

¹⁹ See *Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

²⁰ 5 U.S.C. § 8128(a).

obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”²¹

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.²²

ANALYSIS -- ISSUE 2

OWCP denied appellant’s schedule award claim because he failed to submit evidence sufficient to establish permanent impairment of a scheduled member due to his accepted work injury. Thereafter, it denied his reconsideration request, without conducting a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He submitted a statement dated February 21, 2017 and stated his disagreement with the February 7, 2017 decision denying his claim for a schedule award. Appellant contended that the A.M.A., *Guides* and the Social Security Administration allowed whole person impairment. He asserted that pursuant to the A.M.A., *Guides* permanent impairments such as his back fusion were to be rated. Appellant requested that an impairment rating be obtained from the physician who performed his surgery. These assertions do not show a legal error by OWCP or a new and relevant legal argument. As noted, a schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.²³ Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole and the back is specifically excluded from the definition of organ under FECA.²⁴ The Board has also held that information regarding other federal agencies is not dispositive with regard to questions arising under FECA.²⁵ Thus, these assertions do not show a legal error by OWCP or a represent a new and relevant legal argument.

²¹ 20 C.F.R. § 10.606(b)(3).

²² *Id.* at § 10.608(b).

²³ *Supra* note 10.

²⁴ *Supra* note 11.

²⁵ *D.I.*, 59 ECAB 158, 162 (2007).

The underlying issue in this case is whether appellant submitted sufficient evidence to establish he sustained permanent impairment to a scheduled member due to his accepted work injury. That is a medical issue which must be addressed by relevant new medical evidence.²⁶ However, appellant did not submit any pertinent new and relevant medical evidence in support of his claim.

Appellant resubmitted an OWCP medical adviser's report and an OWCP decision. However, this evidence is duplicative of evidence previously submitted and considered by OWCP. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁷ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish permanent impairment of his lower extremities due to his accepted employment injuries, thereby warranting a schedule award. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²⁷ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the March 31 and February 7, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 25, 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