

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
San Francisco, CA, Employer**

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**Docket No. 18-0024  
Issued: May 7, 2018**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 2, 2017 appellant filed a timely appeal from a July 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than 25 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

**FACTUAL HISTORY**

On March 21, 2014 appellant, then a 58-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right knee and lower back when he misstepped while climbing out of the tractor. He stopped work following the injury. OWCP

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

accepted the claim for lumbosacral strain with radiculopathy, right knee strain, right knee internal derangement and renal vein thrombosis. Appellant underwent an OWCP authorized total knee replacement on November 17, 2014, which Dr. William R. Campbell, an osteopath and Board-certified orthopedic surgeon, performed. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of May 6, 2014 and on the periodic rolls as of July 27, 2014. Appellant returned to work on March 31, 2015.

On May 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a May 14, 2015 report, Dr. Campbell noted appellant's history of injury and set forth examination findings of appellant's right knee. He opined that maximum medical improvement (MMI) had been reached on May 14, 2015. Dr. Campbell calculated 21 percent whole person impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> There was no documentation of appellant's residual symptoms resulting from his lumbar spine injury.

On July 9, 2015 OWCP referred Dr. Campbell's May 14, 2015 report and the medical record to its medical adviser to determine if appellant sustained a permanent impairment and was entitled to a schedule award. In a July 18, 2015 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, opined that appellant reached MMI on May 14, 2015. He utilized Dr. Campbell's May 14, 2015 examination findings and opined that, under the sixth edition of the A.M.A., *Guides*,<sup>3</sup> appellant had 25 percent right lower extremity permanent impairment for knee replacement arthroplasty with good result. The medical adviser recommended that appellant be seen for reevaluation by Dr. Campbell to document his residual symptoms, if any, in regards to the lumbar spine.

By decision dated September 23, 2015, OWCP issued a schedule award for 25 percent permanent impairment of his right lower extremity. The period of the award ran for 72 weeks.

On December 11, 2015 and January 26, 2016 appellant submitted claims for an additional schedule award (Form CA-7). In an October 22, 2015 report, Dr. Campbell opined that appellant reached MMI with regard to his lumbar condition. He opined, under the fifth edition of the A.M.A., *Guides*, that appellant had 10 percent permanent impairment of the whole person.

By letter dated February 2, 2016, OWCP requested that Dr. Campbell submit a medical report regarding appellant's work-related condition in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Campbell was further advised that if appellant's work-related injuries impaired his upper or lower extremities caused by an injury to the spinal nerve then he should render an impairment rating of the affected extremity using the article entitled "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" which was published in the July/August 2009 *The Guides Newsletter*.

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<sup>2</sup> A.M.A. *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In a March 7, 2016 report, Dr. Campbell opined that appellant was at MMI as of March 7, 2016. Appellant's lumbar spine examination, including the neurological examination of the lower extremities, was essentially normal. Dr. Campbell noted, in relevant part, "[t]he appropriate reference for the impairment rating should be the [sixth edition,] [A.M.A.,] *Guides*, impairment for radiculopathy in the diagnosis-based impairment (DBI) for the spinal region. Based on Chapter 17, using Table 17-1, the impairment rating for class 2, moderate, 12 percent whole person impairment for the lumbar spine, net adjustment zero."

In an April 8, 2016 letter, OWCP again requested that Dr. Campbell submit a report in accordance with the sixth edition of the A.M.A., *Guides* and the July/August 2009 *The Guides Newsletter* to determine any impairment due to appellant's lumbar radiculopathy. It afforded Dr. Campbell 30 days to provide a new impairment rating. OWCP did not receive a response.

By decision dated May 27, 2016, OWCP denied appellant's claim for an additional schedule award. It determined that he did not provide sufficient medical evidence to establish an additional permanent impairment related to his lumbar spine condition.

On June 17, 2016 appellant requested an oral hearing before an OWCP hearing representative. A hearing was held on October 19, 2016. By decision dated December 7, 2016, OWCP's hearing representative vacated the May 27, 2016 decision and remanded the case to OWCP for further development. The hearing representative noted that Dr. Campbell's March 7, 2016 report should have been reviewed by an OWCP medical adviser to determine whether a second opinion referral was necessary to determine appellant's entitlement to an additional schedule award.

On January 9, 2017 OWCP forwarded the medical evidence to its medical adviser. In a January 15, 2017 report, Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, noted that Dr. Campbell had incorrectly based impairment on the spine and had offered an unacceptable rating for the whole person impairment. He opined that appellant reached MMI on June 18, 2015, the date of Dr. Campbell's first impairment examination.<sup>4</sup> Dr. Slutsky explained that appellant's accepted conditions had stabilized and that no further treatment was planned. Using Dr. Campbell's June 18, 2015 examination findings, the medical adviser opined that appellant's final right lower extremity permanent impairment was 21 percent. He advised that lumbar sprains did not result in permanent lower extremity sensory or motor deficits. With regard to appellant's preexisting lumbar condition, the medical adviser reviewed the diagnostic evidence of record.<sup>5</sup> He also noted that Dr. Campbell had found that appellant had normal lower extremity sensation and motor function on his March 7, 2016 examination. Based on that examination, the medical adviser found that there was no basis for lower extremity impairment in either lower extremity due to the lumbar sprain or radiculopathy diagnoses under *The Guides Newsletter* (July/August 2009). He noted that while Dr. Campbell

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<sup>4</sup> Dr. Campbell's first impairment rating report was dated May 14, 2015.

<sup>5</sup> Dr. Slutsky indicated that the May 7, 2014 magnetic resonance imaging (MRI) scan noted mild, multilevel degenerative changes, but no evidence of spinal nerve root involvement. The July 1, 2014 lower extremity electromyogram/nerve conduction velocity (EMG/NCV) study demonstrated chronic, mild bilateral L5 radiculopathies.

had rated appellant under Chapter 17 of the A.M.A., *Guides*, Chapter 17 was not used by the Department of Labor and thus the 12 percent whole person permanent impairment assigned was not applicable. The medical adviser also provided impairment calculations under both DBI and range of motion (ROM) based impairment calculations for appellant's right knee. He opined that the final right lower extremity permanent impairment rating was 21 percent.

By decision dated February 2, 2017, OWCP denied appellant's claim for additional schedule award. It found that, based on its medical adviser's review of the medical record, the medical evidence did not demonstrate permanent impairment of the right lower extremity greater than the 25 percent permanent impairment, for which appellant had previously received a schedule award.

On February 13, 2017 appellant requested that an OWCP hearing representative review the written record. He contended that OWCP's medical adviser was biased and that OWCP should appoint a neutral physician. Appellant also noted that his physician kept using the prior edition of the A.M.A., *Guides*. No additional evidence was submitted.

By decision dated July 7, 2017, an OWCP hearing representative affirmed OWCP's February 2, 2017 decision. The hearing representative noted the medical evidence of record did not support an award for either lower extremity as a result of nerve root involvement as there was no motor or sensory deficit secondary to the employment injury.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> 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*.<sup>8</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>9</sup>

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.<sup>10</sup> Neither FECA nor its implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *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).

<sup>9</sup> *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>10</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

spine or the body as a whole; a claimant is not entitled to such a schedule award.<sup>11</sup> The Board notes that section 8101(19) specifically excludes the back from the definition of organ.<sup>12</sup> 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.<sup>13</sup>

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*.<sup>14</sup> It was designed for situations 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.<sup>15</sup> The Board has recognized the adoption of this methodology as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>16</sup>

OWCP's 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 an OWCP medical adviser providing rationale for the percentage of impairment specified.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has not established more than 25 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

OWCP accepted the conditions of lumbosacral strain with radiculopathy, right knee strain, right knee internal derangement and renal vein thrombosis. It also authorized appellant's November 17, 2014 right knee replacement. On September 23, 2015 appellant received a schedule award for 25 percent permanent impairment of the right lower extremity based on right leg pathology.

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<sup>11</sup> See *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>12</sup> 5 U.S.C. § 8101(19).

<sup>13</sup> *W.D.*, Docket No. 10-0274 (issued September 3, 2016).

<sup>14</sup> The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

<sup>15</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>16</sup> *D.S.*, Docket No. 14-12 (issued March 18, 2014).

<sup>17</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

On December 11, 2015 appellant sought an additional schedule award based on spinal impairment.

In his March 7, 2016 report, Dr. Campbell opined that appellant was at MMI. He noted tenderness to palpation and spasm and found appellant's lumbar spine examination, including the neurological examination of the lower extremities, was essentially normal. Dr. Campbell provided 10 percent whole person impairment rating under Chapter 17 of the A.M.A., *Guides*. FECA, however, specifically excludes the back or spine as an organ and, therefore, it does not come under the provisions for payment of a schedule award.<sup>18</sup> FECA further does not provide for an impairment of the whole person.<sup>19</sup> Dr. Campbell's rating is of diminished probative value as it does not conform to the protocols for rating permanent impairment under FECA.

Pursuant to the December 7, 2016 remand of the case by OWCP's hearing representative, OWCP's medical adviser reviewed Dr. Campbell's report along with the medical evidence of record on January 15, 2017. He indicated that the diagnostic testing and the medical reports failed to document any lower extremity symptoms or basis for an impairment to either lower extremity. Specifically, there was no evidence that a motor or sensory deficit existed secondary to the employment injury. Thus, the medical adviser determined that appellant had no permanent impairment secondary to his accepted lumbar spine condition.

The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* to rate appellant's lower extremity impairment and that his report constitutes the weight of the medical opinion evidence. As noted, an appellant may receive a schedule award for permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.<sup>20</sup> In this case, however, the medical adviser explained that appellant's medical records failed to document any sensory or motor deficient of either lower extremity. As appellant has no evidence of lumbar radiculopathy affecting the lower extremities he was not entitled to a schedule award based on impairment to his lower extremities which originated in the spine.<sup>21</sup>

On appeal appellant indicates that he disagrees with OWCP's decision. However, for the reasons set forth above, there is no evidence which establishes greater than the 25 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

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

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<sup>18</sup> *Francesco C. Veneziani*, 48 ECAB 572 (1997). A schedule award is payable for a permanent impairment of the extremities that is due to a work-related back condition; see *Denise D. Cason*, 48 ECAB 530 (1997); *J.S.*, Docket No. 13-2129 (issued June 6, 2014).

<sup>19</sup> *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>20</sup> *J.S.*, *supra* note 17.

<sup>21</sup> *Supra* note 14.

**CONCLUSION**

The Board finds that appellant has not established more than 25 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board