

FACTUAL HISTORY

On February 9, 2000 appellant, then a 46-year-old maintenance work inspector, filed a traumatic injury claim (Form CA-1) alleging that on November 19, 1999 he sustained injuries to his cervical spine and left shoulder when he was struck on the left side of the neck by a man trying to steal a government van. OWCP initially accepted the claim for cervical sprain, and later expanded acceptance of the claim to include the additional diagnoses of degeneration of the cervical spine and cervical stenosis. Appellant received wage-loss compensation and medical benefits for intermittent periods of disability through January 24, 2006, when he returned to full duty.

On September 7, 2006 appellant filed a claim for a schedule award (Form CA-7).

By decision dated January 8, 2010, OWCP denied appellant's September 7, 2006 schedule award claim. On June 29, 2010 it received his request for review of the written record by an OWCP hearing representative. In a July 12, 2010 decision, an OWCP hearing representative denied appellant's request, finding that it was untimely filed. The hearing representative noted that the issue of permanent impairment could equally be addressed by requesting reconsideration with OWCP.

On July 22, 2016 appellant filed another schedule award claim (Form CA-7). In support of his claim he submitted a May 28, 2016 report in which Dr. Robert W. Macht, a general surgeon, described the history of injury, appellant's medical history, and his review of some medical records, noting that two electrodiagnostic studies did not show definite evidence of ongoing radiculopathy. Appellant provided physical examination findings, noting some decreased sensation of the left thumb and decreased range of motion of both shoulders. Dr. Macht advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),³ that due to bilateral limited shoulder motion, under Table 15-34, appellant had three percent impairment for loss of shoulder flexion bilaterally, and three percent impairment for loss of shoulder abduction bilaterally. He concluded that appellant had six percent impairment of the right upper extremity and six percent impairment on the left, causally related to the November 19, 1999 employment injury. Dr. Macht indicated that maximum medical improvement (MMI) was reached by December 31, 2015.

On November 10, 2016 OWCP referred the medical record, including Dr. Macht's report, and a statement of accepted facts (SOAF) to its medical adviser for review. In a November 17, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, noted his review of the record. He opined that Dr. Macht's report could not be accepted as probative for the purpose of recommending a schedule award as he determined impairment for appellant's shoulders that were not accepted under this claim and did not determine impairment for the accepted conditions. Dr. Katz recommended a second opinion evaluation to determine appellant's employment-related impairment.

In January 2017 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for an opinion regarding appellant's permanent impairment due to the accepted conditions. In a February 9, 2017 report, Dr. Hanley noted his review of the record and

³ A.M.A., *Guides* (6th ed. 2009).

the SOAF that described the accepted cervical conditions. Physical examination demonstrated guarded movement of the cervical spine due to stiffness. Reflexes were intact. Dr. Hanley diagnosed degeneration of the cervical spine and cervical stenosis, status post extensive and complex reconstruction of the cervical spine. He noted that FECA did not allow a schedule award for impairment of the spine, but rather upper or lower extremity impairment if the cause of the impairment is the accepted spinal condition. Dr. Hanley advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had no impairment of his extremities as a consequence of the November 19, 1999 employment injury. He indicated that electrodiagnostic testing showed no signs of gross radiculopathy, and there was no subjective or objective finding to suggest impairment of an extremity, noting that appellant had undergone two very complex spinal reconstructions and had done much better than one would have anticipated. Dr. Hanley found that MMI was reached on January 1, 2007, just over a year after appellant's last operative procedure.

On February 22, 2017 OWCP referred the record with Dr. Hanley's report to Dr. Katz, an OWCP medical adviser. In a February 22, 2017 report, Dr. Katz agreed with Dr. Hanley's conclusion that appellant had no impairment. He concurred that, under FECA, a diagnosed injury originating in the spine may be considered only to the extent that it resulted in permanent impairment of the extremities, generally reflected as spinal nerve impairment, and that it was to be determined using the method described in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). OWCP's medical adviser indicated that, as Dr. Hanley found no motor or sensory deficits in any extremity, appellant had no ratable impairment of any spinal nerve and no ratable impairments under FECA for the accepted spinal conditions. He found MMI was reached on February 9, 2017, the date of Dr. Hanley's evaluation.

Appellant forwarded a February 15, 2017 report in which Dr. Macht noted that appellant's electrodiagnostic study did not show any ongoing radiculopathy. He opined that problems with the cervical region could lead to problems with shoulder mobility, such as appellant's limited flexion and abduction in both shoulders which was causally related to the November 1999 employment injury. Dr. Macht concluded that appellant's loss of shoulder motion was the only clearly definable impairment of the extremities that could be directly attributed to the 1999 employment injury.

By decision dated July 11, 2017, OWCP denied appellant's schedule award claim. It found that Dr. Macht's evaluation was not in accordance with the A.M.A., *Guides*, and credited the opinion of Dr. Hanley, who properly applied the A.M.A., *Guides* and found no ratable impairment due to the accepted spinal injuries.

On July 17, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative. During the hearing, held on January 18, 2018, counsel asserted that appellant's physical examination findings by Dr. Macht established impairment.

By decision dated February 21, 2018, an OWCP hearing representative affirmed the July 11, 2017 decision. She found that Dr. Macht did not use the methodology for rating a spinal nerve impairment specified in *The Guides Newsletter*, and that the weight of the medical opinion established that appellant had no ratable permanent impairment.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of any employment injury.⁴

The schedule award provisions of FECA, and its implementing federal regulation,⁵ 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.⁶ For decisions issued after May 1, 2009, the sixth edition will be used.⁷

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.⁸ 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.⁹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹⁰ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in *The Guides Newsletter*.¹¹ Specifically, it will address lower extremity impairments originating in the spine through Table 16-11¹² and upper extremity impairment originating in the spine through Table 15-14.¹³

⁴ See *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ *Supra* note 7 at Chapter 3.700, Exhibit 1 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹² *Supra* note 3 at 533.

¹³ *Id.* at 425.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

No schedule award is payable for injury to the spine, but a claimant 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.¹⁴

In support of his claim, appellant submitted reports from Dr. Macht who noted examination findings and advised that, under Table 15-34, appellant had three percent permanent impairment for loss of shoulder flexion and three percent permanent impairment for loss of shoulder abduction in each upper extremity, for a total right upper extremity permanent impairment of six percent, and six percent permanent impairment on the left. His accepted conditions however, are cervical sprain, degeneration of the cervical spine, and cervical stenosis, not bilateral shoulder conditions. While Dr. Macht opined that problems with the neck could lead to problems with shoulder mobility, as he did not address permanent impairment in accordance with *The Guides Newsletter*, his opinion is of limited probative value. The proper mechanism for 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 outlined in a July-August 2009 *The Guides Newsletter*.¹⁵ 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.¹⁶

Counsel generally argues on appeal that OWCP must consider the extremity impairment as a whole. However, as Dr. Macht did not address appellant's spinal impairment in accordance with *The Guides Newsletter*, his opinion is of limited probative value.¹⁷

Following the advice of its medical adviser, in January 2017 OWCP referred appellant to Dr. Hanley for a second opinion impairment evaluation. Dr. Hanley found that appellant had guarded movement of the cervical spine due to stiffness. He discussed electrodiagnostic testing that showed no signs of gross radiculopathy, and advised that there was no subjective or objective finding to suggest impairment of an extremity. Dr. Hanley concluded that, in accordance with *The Guides Newsletter*, appellant had no ratable impairment.

On February 22, 2017 Dr. Katz, OWCP's medical adviser, noted his review of the record and agreed with Dr. Hanley's conclusion that appellant had no ratable impairment due to the accepted cervical conditions.

The Board finds that the weight of the medical evidence rests with the opinions of Dr. Hanley and Dr. Katz, its medical adviser. Dr. Hanley based his opinion on an accurate factual

¹⁴ *Supra* note 8.

¹⁵ *Id.*

¹⁶ *Carl J. Cleary*, 57 ECAB 563 (2006).

¹⁷ *Id.*

and medical history and provided findings on examination to support his opinion. The Board finds that there is no medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides* establishing that appellant has permanent impairment of any scheduled member due to the accepted cervical conditions.¹⁸

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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 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

¹⁸ See *C.B.*, Docket No. 15-503 (issued June 12, 2015).