

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, thereby warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On April 5, 2012 appellant filed a Form CA-1 alleging that, on April 4, 2012, he injured his right shoulder and neck area when lifting and moving a dresser. OWCP assigned that claim OWCP File No. xxxxxx651 and on November 28, 2012 accepted it for aggravation of multilevel cervical disc and L4-5 herniation with radiculopathy.⁵

Appellant retired from the employing establishment on June 14, 2013. He elected to receive benefits from the Office of Personnel Management, effective June 14, 2013.

In a letter dated July 1, 2014, OWCP proposed to terminate appellant's entitlement to wage-loss compensation and medical benefits due to his April 4, 2012 employment injury as it found the weight of the medical evidence established that his work-related condition of aggravation of multilevel cervical disc disease and herniation at C4-5 with radiculopathy had resolved. By decision dated August 21, 2014, it terminated his wage-loss compensation and medical benefits, effective that date.

On August 5, 2014 Dr. Burkhardt noted that appellant was involved in a motor vehicle accident on July 8, 2014. He diagnosed cervical degenerative disc disease and bilateral moderate carpal tunnel syndrome. In a note dated April 22, 2015, Dr. Burkhardt opined that appellant had reached maximum medical improvement. Appellant filed a schedule award claim (Form CA-7) on September 4, 2015 under OWCP File No. xxxxxx735.

Appellant filed a schedule award claim (Form CA-7) on September 28, 2015 under OWCP File No. xxxxxx651.

By development letters dated September 29, 2015, OWCP informed appellant that the evidence of record was insufficient to establish his claims. It requested additional medical

⁴ Docket No. 17-0903 (issued October 10, 2017).

⁵ Appellant has filed other claims with OWCP. On December 22, 2006 appellant, then a 50-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that, while at work on December 19, 2006, he pulled a back muscle in his left upper back when he had to suddenly stop a cart which was about to hit a patient. OWCP assigned the claim File No. xxxxxx864, and accepted it as a short form closure. Appellant filed a second Form CA-1 on August 5, 2008 alleging that on June 24, 2008 he was attacked from behind by a patient at work resulting in pulled muscles in his back and shoulder. OWCP assigned that claim File No. xxxxxx599, and on September 18, 2008, accepted it for right shoulder supraspinatus strain and cervical strain. On August 20, 2011 appellant filed a Form CA-1 traumatic injury claim alleging that he sustained back and shoulder pain on August 17, 2011 when lifting bags of soiled linen at work. OWCP assigned that claim OWCP File No. xxxxxx735 and on March 20, 2012 accepted it for right trapezius strain.

evidence addressing his permanent impairment for schedule award purposes and afforded appellant 30 days to respond.

In a note dated October 15, 2015, Dr. Burkhardt opined that appellant's trapezius strain had resolved and noted that he did not conduct impairment ratings. He recommended that appellant be referred to physicians who performed those evaluations for both of his upper extremity and cervical conditions.

By decision dated November 2, 2015, under OWCP File No. xxxxxx735, OWCP denied appellant's claim for a schedule award due to his accepted right trapezius strain based on Dr. Burkhardt's report that appellant's condition had resolved. On November 10, 2015 counsel requested an oral hearing before an OWCP hearing representative.

By decision dated November 5, 2015, under OWCP File No. xxxxxx651, OWCP denied appellant's claim for a schedule award due to his accepted condition of aggravation of multilevel cervical disc disease and disc herniation at C4-5 with radiculopathy as the medical evidence did not establish permanent impairment to a scheduled member.

Appellant through counsel requested an oral hearing before an OWCP hearing representative with regard to OWCP File No. xxxxxx735 by letter dated November 10, 2015 and received on November 17, 2015.

Appellant, through counsel, requested an oral hearing before an OWCP hearing representative with regard to OWCP File No. xxxxxx651 by letter dated and received on November 17, 2015.

A hearing was held on June 29, 2016 with regard to OWCP File No. xxxxxx735. Appellant testified during that hearing that his motor vehicle accident resulted in a lower back condition and that the accident had no effect on his accepted right trapezius strain.

A hearing was held on July 14, 2016 regarding OWCP File No. xxxxxx651. Appellant testified during that hearing that his cervical condition resulted in symptoms in his arms.

By decision dated September 9, 2016, under OWCP File No. xxxxxx735, OWCP's hearing representative found that Dr. Burkhardt's report established that appellant's accepted right shoulder condition had resolved until his automobile accident on July 8, 2014. He determined that appellant did not have a permanent impairment of his right shoulder causally related to his August 17, 2011 employment injury.

By decision dated September 28, 2016, under OWCP File No. xxxxxx651, OWCP's hearing representative found that appellant had not submitted the necessary medical evidence to establish permanent impairment of a scheduled member warranting a schedule award in regard to his accepted condition of aggravation of multilevel cervical disc disease and disc herniation at C4-5 with radiculopathy.

On June 20, 2016 Dr. Michael D. Kasten, a Board-certified orthopedic surgeon, examined appellant and diagnosed multilevel cervical degeneration, radiculopathy, and possibly myelopathy. Appellant underwent cervical electromyograph and nerve conduction velocity (EMG/NCV) testing on August 4, 2016 which demonstrated mild median nerve compression at both wrists.

Dr. Burkhardt examined appellant on October 12, 2016 and diagnosed cervical myelopathy, herniated cervical disc, and neck pain.

On September 8, 2016 Dr. Neil Allen, a Board-certified neurologist, examined appellant to determine his percentage of permanent impairment for schedule award purposes. He mentioned the employment injury of April 4, 2012, but described the June 24, 2008 employment injury during which appellant was assaulted by a patron, further noting that he lost his balance and fell forward, striking his chin against the floor, jerking his head and neck backward. Dr. Allen opined that appellant sustained a cervical spine injury with pain and numbness extending into both hands and difficulty swallowing. He provided his findings on grade modifiers of functional history, three; and clinical studies, two. Dr. Allen applied appellant's impairment based on the spinal nerve impairment in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July /August 2009) (*The Guides Newsletter*) for mild motor deficit of C6 and C7. He applied the net adjustment formula and determined that appellant had nine percent permanent impairment due to motor impairment of C6, and nine percent permanent impairment due to motor impairment of C7. Dr. Allen found that appellant had 18 percent permanent motor impairment of the upper extremities based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On November 15, 2016 appellant, through counsel, requested reconsideration of the September 28, 2016 OWCP decision under OWCP File No. xxxxxx651.

By decision dated February 9, 2017, OWCP reviewed the merits of appellant's claim and found that he had submitted insufficient medical evidence to establish permanent impairment of his upper extremities warranting a schedule award. It found that Dr. Allen had not attributed appellant's current permanent impairment to the accepted employment injury of April 4, 2012. OWCP found that Dr. Allen's report was not based on an accurate history of injury and was insufficient to meet appellant's burden of proof to establish permanent impairment as a result of his accepted employment injury.

Appellant, through counsel, appealed to the Board. By decision dated October 10, 2017, the Board set aside the February 9, 2017 decision and directed OWCP to administratively combine his files regarding his previous cervical injuries, evaluate his schedule award claim, and issue a *de novo* decision.⁶

Following the Board's decision, OWCP administratively combined OWCP File Nos. xxxxxx864, xxxxxx599, xxxxxx651, and xxxxxx735 with OWCP File No. xxxxxx735 serving as the master file.

In a letter dated February 1, 2018, it advised appellant that his claim under OWCP File No. xxxxxx651 was accepted for displacement of cervical intervertebral disc without myelopathy, and in further consideration of his schedule award claim, it requested a detailed narrative medical report regarding permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. OWCP afforded appellant 30 days to respond.

⁶ *Supra* note 4.

By decision dated February 7, 2018, OWCP reviewed the medical evidence and denied appellant's claim for a schedule award under OWCP File No. xxxxxx651, finding that the medical evidence of record was insufficient to establish his claim.

LEGAL PRECEDENT

Section 8107 of FECA⁷ and section 10.404 of the implementing federal regulations,⁸ provide for payment for permanent impairment of specified members, functions, and organs of the body. FECA, however, does not specify the manner in which the percentage loss of a member 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.⁹ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*.¹⁰

Neither FECA nor its implementing regulations provide for the payment of a schedule for the permanent loss of use of the back/spine or the body as a whole.¹¹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹² The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹³ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures provide that *The Guides Newsletter* (July/August 2009) is to be applied as provided in section 3.700 of its procedures.¹⁴ Specifically, it will rate upper extremity impairment originating in the spine through Table 15-14.¹⁵

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment method of determining the percentage of permanent impairment. In addressing upper extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX),

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *F.S.*, Docket No. 18-0383 (issued August 22, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013, March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *F.S., id.; W.D.*, Docket No. 10-0274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

¹² *W.D., id.; Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ *Supra* note 10 at Chapter 2.808.5(c)(3) (March 2017).

¹⁴ FECA Transmittal No. 10-0004 (issued January 9, 2010); *supra* note 5 at Chapter 3.700, at Exhibit 4 (January 2010).

¹⁵ A.M.A., *Guides*, 425, Table 15-14.

which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁶

ANALYSIS

The Board finds that this case is not in posture for a decision.

The record contains a detailed report from Dr. Allen dated September 8, 2016 addressing appellant's percentage of upper extremity permanent impairment and describing the incident in which he was attacked from behind by a patient at work, resulting in right shoulder supraspinatus strain and cervical strain. OWCP found in its February 7, 2018 decision that Dr. Allen's description of the employment incident was inaccurate as he used the date of April 4, 2012 as the date of injury when the attack by a patient actually occurred on June 24, 2008. It accepted under OWCP File No. xxxxxx599 that that injury caused the accepted conditions of right shoulder supraspinatus strain and cervical strain. As the cause of the injury and the resulting conditions accepted by OWCP are no longer in dispute, the Board finds the discrepancy as to the date of injury by Dr. Allen is harmless error as it relates to the present issue of extent of permanent impairment.¹⁷

Dr. Allen noted that appellant was attacked by a patient and was pulled back. These are the salient facts as presented on appellant's claim form and medical treatment notes regarding the accepted June 24, 2008 employment incident. While Dr. Allen also indicated that appellant sustained a fall and blow to the chin, these additions do not negate appellant work-related history of an attack and resulting injury. OWCP's procedures require that if there is indication of permanent impairment in the medical evidence the claims examiner should obtain an opinion from the medical adviser or a second opinion evaluator.¹⁸ The Board finds that there are clear indications within Dr. Allen's report that appellant had permanent impairment of his upper extremities as a result of his accepted conditions. Therefore, in keeping with its procedures, OWCP should have obtained an opinion from a medical adviser or second opinion physician.¹⁹

On remand, OWCP should prepare a detailed statement of accepted facts, including all the accepted upper extremity and cervical incidents and resulting injuries, and refer appellant for further medical development to determine the nature and extent of permanent impairment, if any, of his upper extremities as a result of his accepted conditions. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision regarding whether he has met his burden of proof to establish permanent impairment of his upper extremities warranting schedule award compensation.

¹⁶ *Id.* at 411. *F.S.*, *supra* note 9.

¹⁷ *See M.M.*, Docket No. 07-1899 (issued October 2, 2008).

¹⁸ *Supra* note 10 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, 2.0808.6c-d (March 2017).

¹⁹ *Id.*

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2018 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: November 29, 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