

FACTUAL HISTORY

This case has previously been before the Board.² The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 28, 2001 appellant, then a 33-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on August 25, 2001 when a heavy jug fell on top of him while in the performance of duty. On January 28, 2002 OWCP accepted the claim for low back sprain. On August 29, 2003 it expanded acceptance of the claim to include cervical radiculopathy, right C6, and bilateral C8-T11. OWCP paid appellant wage-loss compensation and medical benefits on the periodic rolls as of November 4, 2003. Appellant elected Office of Personnel Management (OPM) retirement benefits, effective April 2, 2014.

The record contains an April 13, 2014 cervical electromyogram (EMG) and nerve conduction velocity (NCV) study for the upper extremities which demonstrated bilateral carpal tunnel syndrome and suspected bilateral C6 radiculitis. An electrodiagnostic study for the lower extremities dated December 16, 2014 demonstrated L5 radiculopathy.

In a report dated May 3, 2015, Dr. Tomas Hernández Ortiz, a neurologist, provided a history and results of an April 28, 2015 examination. He diagnosed work-related cervical radiculopathies bilaterally at C5-6 and C8-T11, L1-2 protruded disc, and bilateral L5-S1 radiculopathies. Dr. Hernández Ortiz also diagnosed nonemployment-related carpal tunnel syndrome and right median nerve release. On physical examination he found adequate muscle tone, and reported moderate loss of fingering and grip strength worse on the right following carpal tunnel release. Dr. Hernández Ortiz reported no sensory deficit in any of the modalities tested. Appellant's reflexes were equal bilaterally. Dr. Hernández Ortiz provided a whole person permanent impairment rating of 16 percent under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ using a "Spine and Pelvis impairment calculation methodology" for the cervical and lumbar spine.

OWCP requested that district medical adviser (DMA), Dr. Henry Magliato, a Board-certified orthopedic surgeon, review the report from Dr. Hernández Ortiz and provide an opinion as to the degree of appellant's permanent impairment. In a report dated June 16, 2015, Dr. Magliato opined that the report of Dr. Hernández Ortiz was of no value in determining permanent impairment under the A.M.A., *Guides*. He indicated that Dr. Hernández Ortiz had used diagnostic grids for the spine and whole person impairment, which were not appropriate under FECA. Dr. Magliato recommended a referral to a second opinion physician.

On July 20, 2015 OWCP received a revised report dated July 11, 2015 from Dr. Hernández Ortiz. The examination results from April 28, 2015 were repeated, however, Dr. Hernández Ortiz provided an opinion as to permanent impairment based on *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using July/August 2009 (hereinafter *The Guides Newsletter*). For the upper extremities, he opined that there was one percent permanent impairment for sensory

² Docket No. 17-1156 (issued September 13, 2017); Docket No. 16-0905 (issued January 4, 2017).

³ A.M.A., *Guides* (6th ed. 2009).

deficit and five percent permanent impairment for motor deficit of C6 root and T1 nerve roots. Dr. Hernández Ortiz indicated that although only a right C6 root lesion had been accepted, it was appropriate to provide a bilateral upper extremity impairment rating. He found 12 percent permanent impairment for the bilateral C8-T1 root lesions for a total of 18 percent permanent impairment for the upper extremities nerve involvement. As to the lower extremities, Dr. Hernández Ortiz opined that appellant had one percent permanent impairment due to sensory deficit and three percent permanent impairment due to motor deficit to each lower extremity.

OWCP referred appellant for a second opinion examination by Dr. Fernando Rojas, an orthopedic surgeon. In a report dated September 22, 2015, Dr. Rojas provided a history and results from his August 28, 2015 examination. He reported normal strength and function without sensory deficits in the upper extremities, but with appellant's symptoms of paresthesias. Dr. Rojas noted loss of deep tendon reflexes in the left lower extremity only with no motor or sensory deficits, but radicular pain. He reviewed Dr. Hernández Ortiz' report and noted that he based his impairment rating on decreased range of motion and localized paraspinal spasms while the neurological findings were normal. Dr. Rojas opined that appellant had two percent permanent impairment of right and left upper extremities based on carpal tunnel syndrome which was not employment related, and no percentage of permanent impairment based on *The Guides Newsletter*. In applying *The Guides Newsletter* he assigned zeros for all diagnosis classes and grade modifiers.

By report dated October 27, 2015, DMA Dr. Magliato found that the second opinion physician's report was confusing and of "no value." He indicated that Dr. Rojas had provided vague calculations that were difficult to understand, and he noted that carpal tunnel syndrome had not been accepted. Dr. Magliato recommended referral to another second opinion physician. In a memorandum of telephone call (Form CA-110) dated November 24, 2015, OWCP advised appellant that he would be receiving another referral for a second opinion examination.

The record contains a letter dated November 24, 2015 from the second opinion referral service, advising that Dr. Rojas was the only orthopedic surgeon on the panel who performed federal workers' compensation examinations. OWCP sent a letter dated November 25, 2015 to Dr. Hernández Ortiz, requesting an additional report regarding permanent impairment. It referred to *The Guides Newsletter* and noted that whole person impairments were not appropriate under FECA.

In a report dated December 12, 2015, Dr. Hernández Ortiz reported that he had already answered OWCP's questions in his July 11, 2015 report. OWCP referred the evidence to another DMA, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon for review.

In a report dated January 8, 2016, Dr. Harris opined that appellant had one percent permanent impairment of each of his upper and lower extremities. He indicated that, for the upper extremities, there was one percent permanent impairment for C6 nerve root "mild pain/impaired sensation." In discussing this impairment, Dr. Harris referred to the May 3, 2015 report from Dr. Hernández Ortiz, and indicated that he had improperly used the diagnosis-based grids for the spine. As to the lower extremities, he found that there was one percent permanent impairment for L5 mild pain/impaired sensation. Dr. Harris did not discuss motor deficit. He reported that there was no impairment for C8 and T1 radiculopathy, as the attending physician did not demonstrate

any neurological deficit consistent with radiculopathy. Dr. Harris indicated that electrodiagnostic studies were consistent with C6 and L5 radiculopathy.

By decision dated January 19, 2016, OWCP issued appellant a schedule award for one percent permanent impairment of each of his upper and lower extremities. The period of the award was for 12 weeks commencing April 28, 2015.

On March 25, 2016 appellant appealed to the Board. By decision dated January 4, 2017, the Board found that Dr. Hernández Ortiz had not established C8 and T1 nerve root permanent impairments. The Board further found that Dr. Harris, serving as a DMA, had not explained why motor deficit ratings for the C6 and L5 nerve roots were inappropriate. The case was therefore remanded for a clarifying report on this issue from Dr. Harris.⁴

In a January 23, 2017 memorandum, OWCP requested that Dr. Harris provide a supplemental report in his role as DMA. The memorandum indicated, *inter alia*, that no explanation had been provided as to why a motor deficit rating under *The Guides Newsletter* was inappropriate for the C6 and L5 nerve roots.

In a report dated January 25, 2017, Dr. Harris reviewed the July 11, 2015 report of Dr. Hernández Ortiz and found that his examination did not demonstrate neurological deficit in either upper or lower extremities, but reported 18 percent permanent bilateral upper extremity impairment due to cervical radiculopathy. He then reviewed Dr. Rojas' September 22, 2015 report and found that this examination did not demonstrate any neurologic deficit in either the upper or lower extremities. Dr. Harris opined that appellant had no permanent impairment of any extremity.

By decision dated February 10, 2017, OWCP found that appellant was not entitled to an additional schedule award. It found that the January 25, 2017 report of Dr. Harris represented the weight of the medical evidence.

On May 4, 2017 appellant appealed to the Board. By decision dated September 13, 2017, the Board set aside the February 10, 2017 decision and remanded the case for further development. The Board found that Dr. Harris did not sufficiently explain in his January 25, 2017 report why his impairment rating changed from the one percent permanent impairment of each extremity found in his January 8, 2017 report. Furthermore, his January 25, 2017 report lacked an explanation of how the A.M.A., *Guides* and/or *The Guides Newsletter* were used to calculate his finding of zero percent permanent impairment. The Board remanded the case for further development to properly resolve the issue of increased permanent impairment.

On remand, OWCP again referred the case record to Dr. Harris, as a DMA, along with the specific questions raised by the Board in its September 13, 2017 decision. Dr. Harris responded on October 18, 2017 and identified appellant's work-related conditions. He opined that appellant had no permanent impairment based on *The Guides Newsletter* for rating spinal nerve impairment. Dr. Harris further noted that spinal nerve impairment did not include range of motion ratings. He reviewed Dr. Hernández Ortiz' July 21, 2015 report and found no report of abnormal sensation in either the upper or lower extremities. Dr. Harris also noted that Dr. Hernández Ortiz did not

⁴ Docket No. 17-1156 (issued September 13, 2017).

document specific muscle weakness or motor deficits consistent with cervical radiculopathy and that Dr. Hernández Ortiz did not provide an explanation for the loss of grip strength or fingering strength. He then reported that the methodology of *The Guides Newsletter* was based on the description of sensory and motor deficits and required the presence of these impairments for permanent impairment ratings. Dr. Harris found that appellant did not have a neurologic deficit consistent with radiculopathy in the upper or lower extremities.

By decision dated January 10, 2018, OWCP denied appellant's claim for additional schedule award compensation, finding that Dr. Harris' report established that appellant had no permanent impairment in his upper or lower extremities due to his accepted employment injuries.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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*, published in 2009.⁷ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.⁹

Neither FECA nor its 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* provides a specific

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

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

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *P.R.*, *id.*; *Carol A. Smart*, 57 ECAB 340 (2006).

¹⁰ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *D.B.*, Docket No. 17-0930 (issued July 11, 2018); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹¹ *Supra* note 7 at Chapter 2.808.5c(3) (March 2017).

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 Federal (FECA) Procedure Manual.¹³

ANALYSIS

The Board finds that appellant has not established more than one percent permanent impairment of his bilateral upper and lower extremities.

OWCP accepted that appellant sustained low back sprain and cervical radiculopathy, right C6 and bilateral C8-T11, and awarded schedule award compensation for one percent permanent impairment of each of his upper and lower extremities.¹⁴

Appellant submitted reports from Dr. Hernández Ortiz in support of his claim. Dr. Hernández Ortiz opined that appellant had sustained one percent permanent impairment for sensory deficit and five percent permanent impairment for motor deficit of C6 root and T1 nerve roots. He indicated that, although only a right C6 root lesion had been accepted, it was appropriate to provide a bilateral upper extremity impairment rating. Dr. Hernández Ortiz found 12 percent permanent impairment for the bilateral C8-TI root lesions for a total of 18 percent permanent impairment for the upper extremities nerve involvement.¹⁵

As to the lower extremities, Dr. Hernández Ortiz opined that there was one percent permanent impairment for sensory deficit and three percent permanent impairment for motor deficit to each lower extremity. The Board finds that his reports failed to provide the medical findings on which he based his impairment ratings or clearly explain how he calculated appellant's impairment under *The Guides Newsletter*. The Board has held that when an attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* or does not discuss how he or she arrives at the degree of impairment based on physical findings, the 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.¹⁶ Thus, Dr. Hernández Ortiz' reports are of diminished probative value regarding

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 *Supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010).

¹⁴ Findings made in prior Board decisions are res judicata absent further review by OWCP under section 8128 of FECA. *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁵ In the January 4, 2017 decision, the Board found that Dr. Hernández Ortiz had not established C8 and T1 nerve root permanent impairments.

¹⁶ *See D.B.*, *supra* note 10; *L.M.*, Docket No. 12-0868 (issued September 4, 2012); *John L. McClanic*, 48 ECAB 552 (1997).

appellant's upper and lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.¹⁷

In accordance with the Board's prior decisions, OWCP properly referred the evidence of record to a DMA, Dr. Harris. In his October 17, 2017 report, Dr. Harris found that Dr. Hernández Ortiz' impairment rating was unacceptable for schedule award purposes because he failed to provide physical findings in support of his impairment ratings and failed to correlate these findings with *The Guides Newsletter*.

The Board finds that OWCP's DMA, Dr. Harris, applied the appropriate tables and grading schemes of *The Guides Newsletter* to Dr. Hernández Ortiz' clinical findings. He concluded that appellant had no neurological impairment of the extremities, warranting a schedule award under *The Guides Newsletter* for his accepted cervical and lumbar spine conditions. The DMA's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of *The Guides Newsletter* demonstrating a greater percentage of permanent impairment. Therefore, OWCP properly relied on the DMA's assessment of a zero percent permanent impairment of the bilateral upper and lower extremities in denying additional schedule award compensation for the bilateral upper and 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 greater permanent impairment of his upper or lower extremities than that previously awarded. Accordingly, appellant has not established that he is entitled to additional schedule award compensation.

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 more than one percent permanent impairment of his bilateral upper extremities and one percent permanent impairment of his bilateral lower extremities for which he previously received schedule award compensation.

¹⁷ See *D.B.*, *supra* note 10; *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).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 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