



He reported that the suspect was unlawfully using government property, a U.S. mailbag, to transport stolen goods from a burglarized premise. Appellant stopped work on that date. The record reveals that OWCP accepted appellant's claim for tear of the left knee medial meniscus, consequential impairment to the right leg, and lumbar spondylosis. Appellant retired from the employing establishment in December 1975 due to disability.

Appellant continued to seek medical treatment for symptoms affecting his bilateral lower extremities, lumbar spine, and cervical spine.<sup>2</sup>

On August 11, 2015 appellant filed a claim for an upper extremity schedule award (Form CA-7) due to a cervical condition.

In support thereof, appellant submitted May 14 and 21, 2015 reports by Dr. John D. Meyer, Board-certified in occupational and preventive medicine, who recounted that he treated appellant for spondylosis with continued back and worsening neck pain associated with a remote work injury. Dr. Meyer described the July 2, 1974 employment injury and indicated that appellant had been receiving workers' compensation for his left knee, low back, and cervical spine spondylosis. Upon examination of appellant's cervical spine, he observed diffuse tenderness in the triceps with some bilateral muscle spasm appreciated and bony tenderness over the cervical spine and upper thoracic spine. Sensation examination was intact in all dermatome of the upper extremities. Dr. Meyer indicated that an October 18, 2012 electromyography (EMG) study revealed chronic bilateral radiculopathy C5-6 without ongoing denervation. He referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)<sup>3</sup> and determined that appellant had 80 percent permanent impairment of the cervical spine and 28 percent whole person impairment.

In a September 9, 2015 development letter, OWCP indicated that appellant's claim had been accepted for: tear of medial meniscus of knee, bilateral; cervical spondylosis without myelopathy; lumbosacral spondylosis without myelopathy; displacement of lumbar intervertebral disc without myelopathy; lateral collateral ligament sprain of knee, bilateral; old bucket handle tear of medial meniscus, left; and nontraumatic rupture of other tendon, bilateral. It explained that FECA did not provide for permanent impairment for the cervical spine and requested that Dr. Meyer provide an impairment rating of appellant's affected extremities according to the A.M.A., *Guides* and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

In a November 1, 2015 letter, Dr. Meyer indicated that he was providing an addendum to his previous impairment rating report. He related that diagnostic testing showed that appellant had chronic neuropathic changes consistent with chronic bilateral C5 and C6 radiculopathies. Dr. Meyer assigned grade modifier of 2 for functional history and grade modifier of 3 for clinical

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<sup>2</sup> On March 5, 1974 OWCP granted appellant a schedule award for 20 percent permanent impairment of the left lower extremity. The award ran for 57.6 weeks from January 5, 1976 to February 11, 1977. Over the years between 1989 and 1996 OWCP granted appellant additional schedule award compensation for permanent impairment to his bilateral lower extremities for a total of 64 percent permanent impairment of the left lower extremity and 45 percent permanent impairment of the right lower extremity.

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

studies for each level at C5 and C6. He reported that using Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments of *The Guides Newsletter* appellant had nine percent motor impairment and one percent sensory impairment for each nerve, C5 and C6. Dr. Meyer referenced the Combined Values Chart<sup>4</sup> and calculated that appellant had 10 percent permanent impairment of each of the two nerves, which resulted in 19 percent permanent impairment for the bilateral upper extremities. He reported that appellant also had an overall 34 percent whole person impairment rating.

In a July 25, 2016 letter, OWCP noted its receipt of appellant's claim for schedule award compensation for permanent impairment due to his cervical spine condition. It advised him that the medical evidence of record was insufficient to establish that his work-related condition had reached maximum medical improvement (MMI).

In a January 5, 2017 letter, Dr. Meyer and Dr. Luckshman Coomaralingam, Board-certified in occupational and preventive medicine, noted that appellant had reached MMI regarding his work-related injury and the resulting medial sequelae. He indicated that appellant had reached this status on his last clinic visit in December 2016. Dr. Meyer explained that there had been no progression in appellant's physical examination findings and that the most recent MRI scan showed no significant changes when compared to appellant's prior scans.

On July 26, 2017 appellant filed another schedule award claim (Form CA-7) for his bilateral upper extremities.

Appellant subsequently submitted a June 23, 1988 statement of accepted facts (SOAF), which indicated that appellant's claim was accepted for tear of the left medial meniscus and a consequential impairment to the right leg. He also provided a May 5, 1975 OWCP claim summary form report, which indicated that appellant's accepted conditions included left knee tear of the medial meniscus, consequential impairment to the right leg and lumbar spondylosis.

On October 9, 2017 OWCP received an undated letter from Dr. Meyer and Dr. Coomaralingam, who indicated that they were responding to OWCP's request for evidence regarding the permanency of appellant's injury. Dr. Meyer indicated that the impairments of the spinal nerve are related to the original incident and can all be considered related sequelae of that injury. He requested that OWCP refer to appellant's last note for the full reference citations and opined that appellant had reached MMI regarding the injury that he sustained in 1974.

OWCP also received a printout from the integrated Federal Employees' Compensation System (iFECS) case query which was last updated on March 14, 2011. It listed appellant's accepted conditions as tear of the medial meniscus of the knee, cervical spondylosis without myelopathy, knee sprain, old bucket handle tear of the medial meniscus, lumbosacral spondylosis without myelopathy, and displacement of lumbar intervertebral disc without myelopathy.<sup>5</sup>

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<sup>4</sup> *Id.* at 604.

<sup>5</sup> The ICD 9 codes on the iFECS case query no longer include cervical spondylosis without myelopathy as an accepted condition.

Appellant also submitted a web bill processing portal printout dated November 2, 2012. It indicated that he was eligible for compensation for the following conditions: bilateral lateral ligament sprains; left old bucket tear of the medial meniscus; bilateral nontraumatic tendon ruptures of the neck; lumbosacral spondylosis; lumbar disc displacement; bilateral tears of the medial meniscus of the knees; and cervical spondylosis.

By decision dated April 18, 2018, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of his bilateral upper extremities causally related to his accepted July 2, 1974 employment injury. It noted that the evidence of record failed to establish that his claim was accepted for a cervical injury, and thus, he was not entitled to a schedule award for his cervical condition.

On May 11, 2018 appellant requested a review of the written record before a representative from OWCP's Branch of Hearings and Review. In an accompanying May 10, 2018 statement, he alleged that he had sustained pain in his lower spine, radiating up to his neck, that had never subsided since the July 2, 1974 fall at work. Appellant indicated that he was providing documents, that were previously submitted in the past and approved, that showed that his cervical condition was an accepted condition.

In a May 31, 2018 letter, Dr. Coomaralingam and Dr. Meyer indicated that they had reviewed the April 18, 2018 denial letter, which noted that there was insufficient documentation to support an accepted cervical condition. They noted that appellant had brought documented reports dated from 1979 regarding a neck injury and reported that appellant had brought OWCP documentation, which noted that cervical spondylosis was an accepted condition. Dr. Coomaralingam and Dr. Meyer related that they were writing this letter as further support that appellant had documented proof of his cervical condition prior to 2001 and that they had reviewed a May 14, 2015 impairment rating report in accordance with the A.M.A., *Guides*.

Appellant also submitted a series of examination notes dated August 2, 1979 to December 5, 1985 by Dr. Richard Kaufman, Board-certified in psychiatry and neurology, who recounted appellant's complaints of chronic cervical neck and low back pain.

By decision dated August 31, 2018, OWCP's Branch of Hearings and Review set aside the April 18, 2018 decision and remanded appellant's case for further development. The hearing representative instructed OWCP to obtain all records from the 1974 employment injury to include in the record, particularly medical records, in order to determine whether he sustained a cervical impairment causally related to a neck injury. The hearing representative also instructed OWCP to explain OWCP's documents which showed that cervical spondylosis was an accepted condition.

In an October 3, 2018 decision, OWCP again denied appellant's schedule award claim regarding permanent impairment of his bilateral upper extremities. It noted that a review of the entire case record, including the paper file, was completed and there was no rationalized medical opinion establishing how his cervical spine condition was causally related to the July 2, 1974 employment injury. Thus, OWCP determined that he was not entitled to a schedule award for his cervical condition. Regarding the print-outs, which reflected that appellant's claim was accepted for cervical spondylosis, it concluded that the condition must have been incorrectly added to his case file. OWCP noted that the condition would no longer be reflected in his case file as accepted.

On October 19, 2018 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 6, 2019, an OWCP hearing representative affirmed the October 3, 2018 decision. The hearing representative found that the medical evidence of record was insufficient to establish that appellant sustained permanent impairment of his bilateral upper extremities as a result of the July 2, 1974 employment injury. The hearing representative also noted that the electronic evidence showing acceptance of a cervical condition was in error as nothing in the substantive evidence demonstrated that such a condition was accepted.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing federal 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. 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.<sup>8</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>12</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to 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(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>10</sup> *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>12</sup> *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.<sup>13</sup>

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function as a result of an employment injury.<sup>14</sup> OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>15</sup>

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>16</sup> The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>17</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>18</sup>

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.<sup>19</sup>

### ANALYSIS

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

On July 26, 2017 appellant filed a claim for an increased schedule award due to permanent impairment of his bilateral upper extremities causally related to a July 2, 1974 cervical injury. Although other documents in the case file listed cervical spondylosis without myelopathy as an accepted condition, OWCP denied appellant's schedule award claim in an April 18, 2018 decision, finding that he had not submitted sufficient medical evidence to establish that his cervical condition was causally related to the accepted employment injury. By decision dated August 31, 2018, an OWCP hearing representative set aside the denial decision and remanded the case for

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<sup>13</sup> *Supra* note 9 at Chapter 3.700. *The Guides Newsletter* is included as Exhibit 4.

<sup>14</sup> *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>15</sup> *Supra* note 9, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

<sup>16</sup> 5 U.S.C. § 8128.

<sup>17</sup> *D.R.*, Docket No. 16-0189 (issued September 2, 2016).

<sup>18</sup> *See* 20 C.F.R. § 10.610.

<sup>19</sup> *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *W.H.*, Docket No. 17-1390 (issued April 23, 2018).

further development, including an explanation as to whether and when appellant's claim was accepted for a cervical injury. In decisions dated October 3, 2018 and March 6, 2019, OWCP denied appellant's claim for an upper extremity schedule award. It determined that at some point a cervical condition was incorrectly added as an accepted employment-related condition.

The Board finds that OWCP's March 6, 2019 decision constituted a rescission of the acceptance of his cervical condition claim.<sup>20</sup> As OWCP rescinded the acceptance of appellant's claim for a cervical condition, the Board further finds that OWCP failed to follow its established procedures for rescission.<sup>21</sup> OWCP's procedures require a proposed and final decision rescinding the original finding.<sup>22</sup> These procedures further provide that a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded.<sup>23</sup> OWCP, however, failed to provide a proposed decision rescinding the acceptance of his claim for a cervical condition and did not inform appellant correctly and accurately of the basis of its rescission decision.<sup>24</sup> Consequently, it has not met its burden of proof to rescind acceptance of appellant's claim for a cervical condition.<sup>25</sup>

The case must be remanded to OWCP for a proper decision under its procedures with regard to any rescission proposed by OWCP regarding the acceptance of appellant's claim for a cervical condition.<sup>26</sup> Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's upper extremity schedule award claim for a cervical condition.

### CONCLUSION

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

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<sup>20</sup> See *D.V.*, Docket No. 11-1629 (issued February 3, 2012).

<sup>21</sup> See *B.C.*, *Order Remanding Case*, Docket No. 17-1208 (issued August 15, 2018); *L.M.*, *Order Remanding Case*, Docket No. 16-1464 (issued November 1, 2017).

<sup>22</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.19(b) (February 2013).

<sup>23</sup> *Id.* at Chapter 2.1400.19(d).

<sup>24</sup> *S.R.*, Docket No. 12-1404 (issued December 11, 2012).

<sup>25</sup> See *B.C.*, *supra* note 21; see also *S.R.*, Docket No. 09-2332 (issued August 6, 2010).

<sup>26</sup> See *Y.S.*, Docket No. 10-2325 (issued August 23, 2011); *John M. Pittman*, 7 ECAB 514 (1955).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 6, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: December 3, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board