

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

## **FACTUAL HISTORY**

On January 24, 2022 appellant, then a 51-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2022 he developed a ventral hernia and left lower back pain when he attempted to enter his service vehicle while in the performance of duty. He explained that he grasped the overhead cabin handle and attempted to pull himself up when he felt a pop/tear in his top right abdomen and sharp pain in the left side of his lower back. Appellant stopped work on the date of injury. OWCP accepted the claim for ventral hernia.

On August 22, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of his claim, appellant submitted a May 31, 2022 operative report and discharge summary from Dr. Tara Wilson, a Board-certified general surgeon, noting a diagnosis of left inguinal hernia and describing the left inguinal hernia repair that she performed.

In an August 18, 2022 visit note, Dr. Zaid Al-Faham, Board-certified in occupational medicine, diagnosed left inguinal hernia and diastasis recti and indicated that appellant had reached maximum medical improvement (MMI) on that date. He provided an impairment rating using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> and calculated nine percent whole person impairment based on five percent for diastasis recti and four percent for left inguinal hernia.

In a September 8, 2022 development letter, OWCP requested that appellant submit an impairment evaluation addressing whether he had reached MMI and providing an impairment rating using the sixth edition of A.M.A., *Guides*.<sup>3</sup>

Thereafter, OWCP received a September 13, 2022 statement from appellant requesting appointment of a second opinion physician for a permanent impairment evaluation.

On September 23, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Paul Jain, a Board-certified internist serving as second opinion physician, to determine the extent of any employment-related permanent impairment. It advised him that he should rate the impairment using the sixth edition of A.M.A., *Guides*.<sup>4</sup>

In an October 20, 2022 report, Dr. Jain reviewed the SOAF, the medical evidence of record, the history of injury as reported by appellant, and reported the findings of his physical examination. He diagnosed left inguinal hernia status post May 31, 2022 repair. Using Table 6-10, page 122 of the sixth edition of A.M.A., *Guides*,<sup>5</sup> Dr. Jain found a Class 2 impairment for left inguinal hernia based on physical evidence of frequent discomfort at the site of the left inguinal

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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).

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

<sup>5</sup> *Id.*

hernia repair, which precluded heavy lifting but did not hamper most daily activities. He also noted a well-healed scar with numbness and paresthesia, no tenderness to palpation, and no recurrent hernia defect on the left side. Dr. Jain then calculated a 13 percent whole person permanent impairment rating for left inguinal hernia with a date of MMI of July 13, 2022.

On December 16, 2022 OWCP requested that Dr. Jain issue a supplemental report addressing the expansion of the acceptance of appellant's claim to include diastasis recti, including an opinion on whether the diagnosis was causally related to the January 23, 2022 work injury and an impairment rating for the condition, with explanation, and a date of MMI.

In a January 2, 2023 supplemental report, Dr. Jain reviewed the SOAF, the medical evidence of record, and the history of injury, and diagnosed diastasis recti and left inguinal hernia status post repair. He again noted a date of MMI of July 13, 2022 and, using Table 6-10, page 122 of the sixth edition of A.M.A., *Guides*,<sup>6</sup> calculated Class 2 permanent impairments for the diagnosed conditions. Dr. Jain assigned a rating of 13 percent for left inguinal hernia based on frequent discomfort at the site of the left inguinal hernia repair, noting numbness and paresthesia, no tenderness to palpation, and no recurrent hernia defect on the left side. He assigned a rating of 13 percent for diastasis recti based on evidence of moderate diastasis recti, soft, nondistended, with mild tenderness to palpation.

On January 13, 2023 OWCP expanded its acceptance of the claim to include ventral hernia without obstruction or gangrene, unilateral inguinal hernia without obstruction or gangrene, and abdominal diastasis recti.

On January 13, 2023 OWCP referred the medical record and SOAF to Dr. David Krohn, an OWCP District Medical Adviser (DMA) and Board-certified internist, to determine the extent of appellant's permanent impairment due to his accepted employment-related conditions.

In a January 19, 2023 report, Dr. Krohn reviewed Dr. Jain's examination report as well as the SOAF, the history of injury, and the medical evidence of record. He applied Table 6-10, page 122 of the sixth edition of the A.M.A., *Guides*<sup>7</sup> and found a 13 percent whole person impairment for the diagnosis of diastasis recti, which he graded a Class 2, grade C impairment based on physical findings including a palpable defect in supporting structures of the abdominal wall and slight protrusion with increased abdominal pressure, with a grade modifier for frequent discomfort at the site of the defect. As required by FECA,<sup>8</sup> Dr. Krohn converted the whole person impairment to an impairment rating of a particular organ by applying the formula set forth in the Federal (FECA) Procedure Manual<sup>9</sup> and dividing 13 percent by 30 percent and multiplying the result by 100, leading to a finding of 43 percent impairment for diastasis recti for loss of function or of other organs. For the diagnosis of left inguinal hernia repair, he found a Class 0 impairment due to

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* note 1.

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4d(2)(b) (January 2010).

physical findings of no palpable defect in the supporting structures of the abdominal wall and no slight protrusion at the site of the defect, which corresponded to no impairment for that condition under the A.M.A., *Guides*.<sup>10</sup> Dr. Krohn determined that appellant had reached MMI on January 2, 2023, the date of Dr. Jain's evaluation.

On January 24, 2024 OWCP requested that Dr. Jain clarify his report and provide a rating for the specific diagnoses accepted instead of a whole person impairment rating.

In a March 15, 2023 supplemental report, Dr. Jain indicated his agreement with Dr. Krohn's opinions and findings and found a date of MMI of January 2, 2023. He applied Table 6-10, page 122 of the sixth edition of the A.M.A., *Guides*<sup>11</sup> and calculated a zero percent impairment for the diagnosis of left inguinal hernia, which he graded Class 0 based on no evidence of tenderness to palpation or recurrent hernia defect on the left side. Dr. Jain found a Class 2, 13 percent whole body impairment for the diagnosis of diastasis recti based on physical findings of frequent discomfort at the site of the left inguinal hernia repair, which precluded heavy lifting but did not hamper most daily activities. Using the formula in the Federal (FECA) Procedure Manual,<sup>12</sup> he converted this figure to a rating of 43 percent impairment of herniation for loss of function or of other organs.

On March 23, 2023 OWCP requested that Dr. Krohn provide a supplemental report addressing Dr. Jain's March 15, 2023 report and include a permanent impairment rating for the conditions accepted by OWCP, as well as a date of MMI.

In a March 26, 2023 report, Dr. Krohn indicated his agreement with Dr. Jain's revised impairment assignments and date of MMI and noted that they were now identical to those that Dr. Krohn originally assigned. He reiterated his previous findings, calculations, and date of MMI as contained in his January 19, 2023 report.

By decision dated April 6, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. It noted that a schedule award cannot be granted for permanent impairment based on a hernia condition because a hernia is not listed as a scheduled member or organ as defined in FECA or its implementing regulations.<sup>13</sup>

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<sup>10</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 9.

<sup>13</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

## **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>14</sup> and its implementing federal regulations<sup>15</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>16</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>17</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>18</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>19</sup> FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.<sup>20</sup> Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.<sup>21</sup> The Secretary of Labor has made such a determination and, pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus, and tongue to the schedule.<sup>22</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.<sup>23</sup>

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<sup>14</sup> 5 U.S.C. § 8107.

<sup>15</sup> 20 C.F.R. § 10.404.

<sup>16</sup> *Id.* at § 10.404(a).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2, Exhibit 1 (January 2010).

<sup>18</sup> *D.P.*, Docket No. 20-1330 (issued February 19, 2021); *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>19</sup> *See G.S.*, Docket No. 17-1318 (issued October 11, 2017); *Leroy M. Terska*, 53 ECAB 247 (2001).

<sup>20</sup> 5 U.S.C. § 8107(c).

<sup>21</sup> *Id.* at § 8122(c)(22).

<sup>22</sup> 20 C.F.R. § 10.404; *Henry B. Floyd, III*, 52 ECAB 220 (2001).

<sup>23</sup> *Supra* note 17 at Chapter 2.808.6f (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

## 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.

In an August 18, 2022 visit note, Dr. Al-Faham applied the fifth edition of the A.M.A., *Guides*<sup>24</sup> and calculated nine percent whole person impairment based on five percent for diastasis recti and four percent for left inguinal hernia. Similarly, in reports dated October 20, 2022, January 2, and March 15, 2023, Dr. Jain used the sixth edition of A.M.A., *Guides*<sup>25</sup> to calculate zero percent impairment for left inguinal hernia. For the diagnosis of diastasis recti, he used the formula set forth in the Federal (FECA) Procedure Manual<sup>26</sup> and converted a finding of 13 percent whole body impairment to a 43 percent impairment for herniation. FECA, however, does not allow schedule awards for impairment of the body as a whole.<sup>27</sup> Furthermore, a schedule award cannot be granted for a hernia or diastasis recti because neither condition is listed in FECA or its implementing regulations as a scheduled member or function of the body.<sup>28</sup> The terms of FECA are specific as to the method and amount of payment of compensation. Neither OWCP, nor the Board, has the authority to enlarge the terms of FECA or to make an award of benefits under terms other than those specified in the statute.<sup>29</sup> Accordingly, Dr. Al-Faham and Dr. Jain's impairment ratings based on the accepted conditions of diastasis recti and left inguinal hernia are insufficient to establish any ratable impairment.<sup>30</sup>

OWCP properly routed Dr. Jain's report to its DMA, Dr. Krohn.<sup>31</sup> In January 19 and March 26, 2023 reports, Dr. Krohn applied the sixth edition of the A.M.A., *Guides*<sup>32</sup> and found a 13 percent whole person impairment for diastasis recti, which he converted<sup>33</sup> to an impairment rating of 43 percent for impairment of a particular organ. For the diagnosis of left inguinal hernia repair, he found zero percent impairment. As discussed, however, neither left inguinal hernia nor diastasis recti are listed in FECA or the regulations as a scheduled member or function of the body, and thus, there is no basis for awarding a schedule award for a hernia condition.<sup>34</sup>

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<sup>24</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>25</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>26</sup> *Supra* note 9.

<sup>27</sup> *D.K.*, Docket No. 21-0303 (issued July 8, 2021); *S.M.*, Docket No. 14-1052 (issued September 4, 2014).

<sup>28</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404; *see D.C.*, Docket No. 14-1618 (issued December 15, 2014).

<sup>29</sup> *G.S.*, *supra* note 19; *S.K.*, Docket No. 08-848 (issued January 26, 2009).

<sup>30</sup> *See M.M.*, Docket No. 17-0197 (issued May 1, 2018); *J.G.*, Docket No. 12-0995 (issued October 22, 2012).

<sup>31</sup> *Supra* note 24.

<sup>32</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>33</sup> *Supra* note 9.

<sup>34</sup> *Supra* note 29.

As the medical evidence of record is insufficient to establish permanent impairment of a member or function of the body listed in FECA or its implementing regulations, the Board finds that appellant has not met his burden of proof.<sup>35</sup>

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 permanent impairment.

### **CONCLUSION**

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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 6, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>35</sup> *G.S., supra* note 19.