

**United States Department of Labor  
Employees' Compensation Appeals Board**

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<p><b>L.D., Appellant</b></p> <p>and</p> <p><b>DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, NEWARK LIBERTY INTERNATIONAL AIRPORT, Newark, NJ, Employer</b></p>	<p>) ) ) ) ) ) ) )</p>	<p><b>Docket No. 24-0558 Issued: June 17, 2025</b></p>
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*Appearances:*

*James D. Muirhead, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On May 1, 2024, appellant, through counsel, filed a timely appeal from a January 5, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

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

## **FACTUAL HISTORY**

On August 18, 2004, appellant, then a 35-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on August 5, 2004 she sustained an injury to her lower back with radiation into the right lower extremity when she lifted heavy bags while in the performance of duty. She stopped work on August 5, 2004 and did not return. On September 22, 2004, OWCP accepted the claim for lumbar sprain. It subsequently expanded its acceptance of the claim to include herniated L5-S1 disc.

In an April 13, 2015 report, Dr. David Weiss, an osteopath Board-certified in orthopedic surgery, noted a history of injury and treatment. On examination, he observed that appellant ambulated with a forward flexed antalgic gait and a right lower extremity limp, paravertebral muscle spasm, a positive right straight leg raising test at 35 degrees, 4+/5 weakness of the extensor hallucis longus on the right, absent deep tendon reflexes in the right lower extremity, and diminished Semmes-Weinstein monofilament testing. Dr. Weiss noted a pain disability questionnaire (PDQ) score of 127, and a Roland Morris low back pain questionnaire score of 18. He opined that appellant was totally and permanently disabled from work.

In a March 30, 2016 update to his April 13, 2015 report, Dr. Weiss diagnosed chronic post-traumatic lumbosacral sprain and strain, extruded herniated L5-S1 disc, lumbar disc bulges at L3-4 and L4-5, aggravation of preexisting age-related degenerative lumbar disc disease, right lumbar radiculopathy, subsequent brief exacerbation from a December 27, 2012 motor vehicle accident, and status post lumbar epidural block. He opined that appellant reached maximum medical improvement (MMI) on April 13, 2015. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> and *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), Dr. Weiss utilized the diagnosis-based impairment (DBI) rating method to determine that appellant had 21 percent permanent impairment of the right lower extremity. He found that the class of diagnosis (CDX) for appellant's mild sensory deficit of the right L5 nerve root resulted in a Class 1 impairment, with a default value of one percent according to Table 2 of *The Guides Newsletter*. Dr. Weiss assigned a grade modifier for functional history (GMFH) of 3 based on a PDQ score of 127, but found it not applicable, and a grade modifier for clinical studies (GMCS) of 1. He found that a grade modifier for physical examination (GMPE) was not applicable. Dr. Weiss applied the net adjustment formula, (GMCS - CDX), (1-1) = 0, which resulted in no net adjustment, leaving the default value of one percent permanent impairment of the right lower extremity. He again referenced Table 2 of *The Guides Newsletter* to find that the CDX for appellant's the right S1 nerve root with severe sensory deficit resulted in a Class 1 impairment, with a default value of four percent permanent impairment of the right lower extremity. Dr. Weiss assigned a GMFH of 3, but found it not applicable, and a GMCS of 1, and

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

applied the net adjustment formula,  $(GMCS - CDX), (1-1) = 0$ , which resulted in no adjustment of the default four percent permanent impairment of the right lower extremity. He again referenced Table 2 of *The Guides Newsletter* to find that the CDX for appellant's grade IV/V mild motor strength deficit of the right hip flexors resulted in a Class 1 impairment, equaling five percent impairment. Dr. Weiss assigned a GMFH of 3, but found it not applicable, and a GMCS of 1, and applied the net adjustment formula,  $(GMCS - CDX), (1-1) = 0$ , resulting in no net adjustment of the default value of five percent impairment. He then referenced Table 2 to find that the CDX for the grade IV/V mild motor strength deficit of the right extensor hallucis longus resulted in a Class 1 impairment, with a default value of five percent of the right lower extremity. Dr. Weiss assigned a GMFH of 3, but found that it was not applicable, and a GMCS of 1, resulting in no net adjustment of the default value of five percent impairment. He then referenced Table 2 to find that the CDX for appellant's grade III/V moderate motor strength deficit of the right gastrocnemius resulted in a Class 1 impairment, with a default value of eight percent permanent impairment of the right lower extremity. Dr. Weiss assigned a GMFH of 3, but found it was not applicable, and a GMCS of 1. He applied the net adjustment formula,  $(GMCS - CDX), (1-1) = 0$ , which resulted in no adjustment of the default value of eight percent impairment. Dr. Weiss combined the impairments to total 21 percent permanent impairment of the right lower extremity.

On August 27, 2020, appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated October 9, 2020, OWCP informed appellant of the deficiencies of her schedule award claim. It advised her of the type of medical evidence needed, including an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*, and afforded her 30 days to respond.

On January 8, 2021, OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation regarding her permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a January 8, 2021 report, Dr. Askin reviewed the medical record and SOAF. On examination, he observed limited lumbar motion, diminished light touch sensation in a nonanatomic pattern in the right lower extremity, and calf circumference measurements of 37.5 centimeters (cm) on the right and 38.5 cm on the left. Dr. Askin diagnosed a lumbar sprain, L5-S1 disc herniation, and age-related lumbar spondylosis unrelated to the accepted August 5, 2004 employment injury. He noted that appellant had reached MMI as of the date of his examination. Dr. Askin opined that appellant had no permanent impairment of the bilateral lower extremities as she had "only subjective features suggestive of symptom magnification," with no objective residuals of the accepted August 5, 2004 employment injury.

On January 14, 2021, OWCP routed the case to Dr. Kenechukwu Ugokwe, Board-certified in emergency medicine and serving as OWCP's district medical adviser (DMA), for review and an impairment rating.

In a January 20, 2021 report, Dr. Ugokwe concurred with Dr. Askin's January 8, 2021 calculation of zero percent permanent impairment of the bilateral lower extremities as appellant had "no motor or sensory deficit attributable to any particular nerve."

By decision dated February 3, 2021, 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.

On February 8, 2021, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 29, 2021.

By decision dated July 13, 2021, OWCP's hearing representative affirmed the February 3, 2021 decision.

In a January 13, 2022 report, Dr. Weiss contended that Dr. Askin's opinion was of diminished probative value as he did not use Semmes-Weinstein monofilament testing to evaluate sensory deficit, did not provide manual muscle testing measurements as recommended by the A.M.A., *Guides*, and did not note any motor strength deficit in the right lower extremity although appellant had one centimeter calf atrophy on the right. He reiterated that appellant had 21 percent permanent impairment of the right lower extremity.

On March 15, 2022, appellant, through counsel, requested reconsideration.

On July 8, 2022, OWCP routed the case to Dr. Ugokwe for review and an impairment rating.

In an August 2, 2022 report, Dr. Ugokwe opined that appellant had zero percent permanent impairment of the bilateral lower extremities as there was no identified neurologic deficit.

On August 8, 2022, OWCP declared a conflict of medical opinion between Dr. Weiss, for appellant, and Dr. Ugokwe, for the government, regarding the appropriate percentage of permanent impairment of the bilateral lower extremities causally related to the accepted August 5, 2004 employment injury.

On August 22, 2022, OWCP referred appellant, along with the medical record, a SOAF and a series of questions, to Dr. Frank Corrigan, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence.

In a September 15, 2022 report, Dr. Corrigan, serving as the impartial medical examiner (IME) reviewed the medical record and SOAF. On examination, he observed restricted lumbar flexion, full strength of the bilateral lower extremities, and no deficits on pinwheel sensation testing. Dr. Corrigan diagnosed back sprain and displacement of the lumbar disc. He opined that appellant had reached MMI and had 12 percent permanent impairment.

On October 4, 2022, OWCP routed Dr. Corrigan's September 15, 2022 report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA, for a review and determination of appellant's date of MMI and any permanent impairment of his bilateral lower extremities under the sixth edition of the A.M.A., *Guides*.

In an October 25, 2022 report, Dr. Katz opined that Dr. Corrigan's report did not conform to the A.M.A., *Guides* as he found 12 percent permanent impairment of unspecified extremities, but noted no neurologic deficits on examination.

On October 28, 2022, OWCP requested that Dr. Corrigan provide an addendum report with an impairment rating in conformance with the A.M.A., *Guides*.

In a November 22, 2022 supplemental report, Dr. Corrigan referenced the sixth edition of the A.M.A., *Guides* and found that, under Table 17-4 (Lumbar Spine Regional Grid), page 570, the CDX for appellant's intervertebral disc herniation at a single level with a documented positive straight leg raise test resulted in a Class 2 impairment, which equaled 12 percent permanent impairment of the right lower extremity.

On April 4, 2023, OWCP routed the case to Dr. Katz for review of Dr. Corrigan's November 22, 2022 report and an impairment rating.

In an April 12, 2023 report, Dr. Katz found that Dr. Corrigan had again misapplied the A.M.A., *Guides* and recommended selection of a new IME.

On October 12, 2023, OWCP referred appellant, the case record, a SOAF, and a series of questions to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence.

In a November 16, 2023 report, Dr. Pecker noted his review of the medical record and the SOAF. On examination, he observed restricted lumbar motion and decreased pinprick sensation in a nonanatomic distribution. Dr. Pecker diagnosed an L5-S1 disc herniation with natural aging progression and multilevel disc changes. He opined that there was no evidence of a neurological impairment of the right lower extremity. Dr. Pecker referenced Table 17-4 to find seven percent permanent impairment of the whole person.

On December 4, 2023, OWCP routed the case to Dr. Katz to review Dr. Pecker's November 16, 2023 report and an impairment rating.

In a December 10, 2023 report, Dr. Katz opined that Dr. Pecker's November 16, 2023 report did not conform to the A.M.A., *Guides* as he rated appellant's permanent impairment using the spine regional grids, not *The Guides Newsletter*, and provided a whole person impairment.

In a December 12, 2023 letter, OWCP requested that Dr. Pecker provide an addendum report indicating whether appellant had reached MMI, and that he rate any permanent impairment of the lower extremities utilizing *The Guides Newsletter*. It noted that there was no provision for whole person impairment under FECA.

In a December 16, 2023 supplemental report, Dr. Pecker opined that appellant had reached MMI. He referenced Table 2, page 6 of *The Guides Newsletter* to find a class zero impairment of the L4, L5, and S1 spinal nerves, which equaled zero percent permanent impairment of the right lower extremity.

By decision dated January 5, 2024, OWCP denied modification of the July 13, 2021 schedule award determination. It accorded the special weight of the medical evidence to the December 16, 2023 addendum report of Dr. Pecker, the IME.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>4</sup> and its implementing federal regulations,<sup>5</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. 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.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>8</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 that the date on which this occurred (date of MMI), 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>9</sup>

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>10</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>11</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 upper or lower extremities resulting

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at 10.404(a).

<sup>7</sup> Federal(FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> *V.D.*, Docket No. 22-0123 (issued April 20, 2023); *J.P.*, Docket No. 21-0801 (issued December 22, 2021); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>9</sup> *Supra* note 7 at Chapter 2.808.5 (March 2017).

<sup>10</sup> *G.W.*, Docket No. 23-0600 (issued September 20, 2023); *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>11</sup> *See* 5 U.S.C. § 8101(19); *see also T.M.*, Docket No. 23-0211 (issued August 10, 2023); *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.<sup>12</sup> The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>13</sup>

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>14</sup>

### ANALYSIS

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

On October 12, 2023, OWCP referred appellant's case to Dr. Pecker, the IME, to resolve a conflict of medical opinion on the appropriate percentage of appellant's right lower extremity permanent impairment for schedule award purposes. In a November 16, 2023 report, Dr. Pecker utilized Table 17-4, page 570 of the A.M.A., *Guides* to find zero percent permanent impairment of the right lower extremity and seven percent permanent impairment of the whole person. On December 12, 2023, OWCP requested an addendum report from Dr. Pecker. Dr. Pecker submitted a December 16, 2023 supplemental report finding a class zero impairment of the L4, L5, and S1 spinal nerves, to equal a zero percent permanent impairment of the right lower extremity. Thereafter, OWCP issued its January 5, 2024 decision, which denied modification of the July 13, 2021 schedule award determination, based on Dr. Pecker's December 16, 2023 report as the special weight of the medical evidence. The Board finds, however, that Dr. Pecker's December 16, 2023 supplemental report was insufficiently rationalized to resolve the conflict of medical opinion.

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the IME for the purpose of correcting the defect in the original opinion.<sup>15</sup> The Board has held that when an IME's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate

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<sup>12</sup> *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>13</sup> *C.J.*, Docket No. 21-1389 (issued July 24, 2023); *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>14</sup> *V.K.*, Docket No. 21-1006 (issued September 25, 2023); *D.C.*, Docket No. 23-0455 (issued August 28, 2023); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>15</sup> *R.C.*, Docket No. 25-0414 (issued May 30, 2025); see *P.H.*, Docket No. 24-0897 (issued November 20, 2024); *F.H.*, Docket No. 17-1924 (issued January 25, 2019); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Talmadge Miller*, 47 ECAB 673 (1996); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

on the original report, or if the supplemental report is vague, speculative or lacks rationale, OWCP must refer the employee to a new IME for a rationalized medical opinion on the issue in question.<sup>16</sup>

The case shall therefore be remanded to OWCP for referral to a new IME to resolve the conflict in the medical evidence on the issue of whether appellant has an employment-related permanent impairment causally related to the accepted August 5, 2004 employment injury. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2024 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 17, 2025  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> *Id.*; see also R.T., Docket No. 17-0925 (issued December 14, 2017).