

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

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G.K., Appellant )

and )

DEPARTMENT OF THE NAVY, NAVAL AIR )  
WARFARE CENTER AIRCRAFT DIVISION, )  
Lakehurst, NJ, Employer )

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**Docket No. 12-58**  
**Issued: December 11, 2012**

*Appearances:*  
Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 5, 2011 appellant, through counsel, timely appealed the June 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has a ratable impairment of the lower extremities due to his accepted lumbar/coccyx condition.

**FACTUAL HISTORY**

On September 13, 1999 appellant, then a 43-year-old carpenter, slipped and fell on a wet tile floor and landed on his tailbone. OWCP accepted his claim for lumbar sprain and coccyx disorder. In October 2002, appellant filed a claim for a schedule award (Form CA-7). Dr. David

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

Weiss, a Board-certified osteopath, provided an April 15, 2002 impairment rating of the left lower extremity. His rating of 46 percent impairment was based on a combination of pain (3 percent), sensory deficit involving the L5 and S1 nerve roots (4 percent each), and motor/strength deficits involving the L4 (17 percent), L5 (18 percent) and S1 (10 percent) nerve roots.<sup>2</sup> According to Dr. Weiss, appellant reached maximum medical improvement (MMI) as of April 15, 2002. In an August 20, 2002 report, Dr. Weiss found three percent right lower extremity impairment due to pain.

On August 22, 2008 the district medical adviser reviewed the case record and found that appellant did not have any ratable impairment of the extremities. OWCP subsequently forwarded a copy of the district medical adviser's report to Dr. Weiss for review. In a report dated February 12, 2009, Dr. Weiss reaffirmed the 46 percent left lower extremity impairment rating. He noted that although appellant's electrodiagnostic study was negative for radiculopathy, the symptoms and physical examination findings correlated with a lumbar radicular injury.<sup>3</sup> On March 10, 2009 the district medical adviser reviewed the report of Dr. Weiss and disagreed with the lower extremity impairment rating.

Pursuant to OWCP's request, Dr. Weiss submitted an April 22, 2010 impairment rating under the sixth edition of the A.M.A., *Guides* (2008).<sup>4</sup> He found 39 percent left lower extremity peripheral nerve impairment under Table 16-12, A.M.A., *Guides* 535 (6<sup>th</sup> ed. 2008). On May 24, 2010 Dr. Andrew A. Merola, an OWCP medical adviser, reviewed the record and found 28 percent left lower extremity impairment under Table 16-12, A.M.A., *Guides* 534-36.<sup>5</sup>

OWCP found a conflict in medical opinion between Dr. Weiss, for appellant and Dr. Merola, as to the extent of permanent impairment. It referred appellant to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon selected as the impartial medical examiner. On September 8, 2010 Dr. Fries reviewed the medical records provided by OWCP, as well as certain medical records provided by appellant from 2008 to 2009. This latter evidence included a June 24, 2008 lumbar magnetic resonance imaging (MRI) scan that revealed disc desiccations from L1 through S1 and disc bulging from L1 through L5. At the L4-5 level there was evidence of bilateral foraminal encroachment, left greater than right.

In a report dated September 23, 2010, Dr. Fries diagnosed: (1) chronic low back pain with minor L4-5 and L5-S1 disc degeneration; (2) bilateral lower extremity peripheral neuropathies, left greater than right; (3) depression and anxiety; and (4) diabetes mellitus. He

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<sup>2</sup> Dr. Weiss rated appellant under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001).

<sup>3</sup> The latest electromyography and nerve conduction study (EMG/NCV) dated August 27, 2001, revealed lower extremity mild peripheral neuropathy, left greater than right. However, the August 27, 2001 study showed no evidence of lumbosacral radiculopathy or myopathy. An earlier study, dated May 10, 2000, also did not reveal any definite electrical evidence of acute lumbosacral radiculopathy.

<sup>4</sup> Dr. Weiss did not reexamine appellant, but instead relied on his April 15, 2002 examination findings.

<sup>5</sup> The medical adviser disagreed with one component of Dr. Weiss' overall rating, the 14 percent impairment attributable to hip flexor weakness (L3 nerve root). Dr. Fries noted that this aspect of the rating was neither documented nor confirmed on an anatomical basis. Dr. Merola otherwise concurred with Dr. Weiss' impairment rating.

found that appellant did not have any lower extremity impairment due to his accepted conditions, which by definition did not include local lower extremity pathology or referred symptoms. Dr. Fries explained that appellant had no physical, imaging or electrodiagnostic findings to support lower extremity impairment, whatever the cause. He rated one percent whole person impairment under Table 17-4, Lumbar Spine Regional Grid, A.M.A., *Guides* 570 (6<sup>th</sup> ed. 2008). Dr. Fries found that appellant reached MMI as of March 26, 2001.

Dr. Henry J. Magliato, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed the case on October 12, 2010. He noted that under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) peripheral nerve impairment cannot be used if there is no radiculopathy. Dr. Magliato further noted that, although Dr. Fries found a one percent whole person spinal impairment, OWCP did not accept whole person impairment ratings in issuing schedule awards.

By decision dated November 8, 2010, OWCP denied appellant's claim for a schedule award. After conducting a hearing on March 31, 2011, the Branch of Hearings and Review issued a June 28, 2011 decision affirming the November 8, 2010 decision.

### **LEGAL PRECEDENT**

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>6</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>7</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>8</sup>

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.<sup>9</sup> Neither FECA nor the 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>10</sup> However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.<sup>11</sup> Not all impairments to a scheduled

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<sup>6</sup> 5 U.S.C. § 8107(c).

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

<sup>9</sup> *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

<sup>10</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

member need be employment related. Under certain circumstances, previous impairments may be included in calculating the percentage of loss.<sup>12</sup>

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>13</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>14</sup> Where OWCP has referred the employee to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>15</sup>

### ANALYSIS

On appeal, counsel challenged OWCP's reliance on Dr. Fries' September 23, 2010 opinion. The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.<sup>16</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.<sup>17</sup> The impairment is premised on evidence of radiculopathy affecting the lower extremities.<sup>18</sup> Dr. Fries found that appellant had no physical, imaging or electrodiagnostic findings to support lower extremity impairment, whatever the cause. Dr. Magliato noted that, without evidence of radiculopathy, peripheral nerve impairment cannot be rated under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008). He noted that Dr. Fries found that the imaging and electrodiagnostic testing did not support impairment.

The Board notes that the evidence Dr. Fries cited in support of his opinion appears dated. Appellant also provided a June 24, 2008 lumbar MRI scan report which noted a diffuse disc bulge at L4-5 with foraminal encroachment. Dr. Fries addressed two prior lumbar MRI scans dated October 20, 1999 and February 14, 2001. Despite being authorized by OWCP to obtain further diagnostic testing, Dr. Fries relied on two EMG/NCV studies dated May 10, 2000 and August 27, 2001 without sufficient explanation.

The report of an impartial specialist must fulfill the purpose for which it was intended, it must resolve the conflict in medical opinion.<sup>19</sup> If the opinion is vague, speculative, incomplete

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<sup>12</sup> *Id.* at Chapter 2.808.7a(2); *see R.D.*, 59 ECAB 127, 130 (2007).

<sup>13</sup> 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The district medical adviser, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>14</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>15</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing & Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).

or not rationalized, it is OWCP's responsibility to secure a supplemental report to correct the defect.<sup>20</sup>

The Board finds that Dr. Fries' September 23, 2010 report is not sufficiently well rationalized. Dr. Fries based his opinion in part on dated clinical studies and failed to adequately address appellant's June 24, 2008 lumbar MRI scan. OWCP should refer the case back to him and request that he provide additional explanation of the diagnostic tests of record. Should Dr. Fries find it necessary, he should obtain additional testing. The case shall be remanded for further medical development. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

**CONCLUSION**

The case is not in posture for decision as to the extent of permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2011 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 11, 2012  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *Id.*