

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

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H.T., Appellant)	
)	
and)	Docket No. 17-0144
)	Issued: July 18, 2017
U.S. POSTAL SERVICE, MORRIS)	
PROCESSING & DELIVERY CENTER,)	
Washington, DC, Employer)	
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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 28, 2016 appellant filed a timely appeal from a May 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated May 23, 2017, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0144 (issued May 23, 2017).

ISSUE

The issue is whether appellant has more than six percent permanent impairment of his left lower extremity, for which he previously received a schedule award.³

On appeal, appellant alleges that OWCP improperly evaluated the medical evidence and there remains an unresolved conflict in the medical evidence.⁴

FACTUAL HISTORY

On October 31, 2012 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2012 he sprained his lower back while transferring and pulling mail from a dolly in the performance of duty. He stopped work on October 18, 2012.

On November 29, 2012 OWCP accepted appellant's claim for sprain of the lumbar region of the back. It later expanded the accepted conditions to include aggravation of lumbar stenosis and displacement of lumbar intervertebral disc without myelopathy. Appellant received wage-loss and medical compensation benefits on the supplemental rolls as of December 2, 2012 and on the periodic rolls as of April 7, 2013.

On September 6, 2013 appellant underwent an anterior lumbar discectomy at L3-4 and L4-5 anterior interbody fusion at L3-4 and L4-5, an anterior spinal process device placement at L3-4 and L4-5, and a lateral fusion from L3 to L5. On September 13, 2013 he underwent a reexploration of the laminectomy at the fusion site and a debridement and primary closure. Preexisting or concurrent medical conditions included moderate-to-severe spinal stenosis at L3-4 and L4-5, and disc dehydration at L4-5 and L5-S1. Appellant stopped work on October 18, 2012 and returned to light-duty work on December 27, 2013. He was cleared to return to work in a full-duty capacity on April 11, 2014.

On February 11, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a March 13, 2014 report, Dr. Saied Jamshidi, appellant's treating Board-certified neurosurgeon, diagnosed radicular low back pain and lumbar disc degeneration and indicated that appellant had reached maximum medical improvement. He noted that pursuant to Table "29,34" of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), appellant had 30 percent permanent impairment

³ During the pendency of this appeal, a hearing representative issued a November 10, 2016 decision affirming the May 5, 2016 schedule award decision. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in the same case at the same time. If that is the case, then why do we have to void it. *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990), 20 C.F.R. § 501.2(c)(3). Thus, OWCP's November 10, 2016 decision is null and void.

⁴ Appellant submitted additional evidence after OWCP rendered its May 5, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and, therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

rating with regard to his back and 15 percent permanent impairment rating for each leg, for a combined 60 percent permanent impairment rating.

OWCP's medical adviser reviewed Dr. Jamshidi's report on April 30, 2014, found it to be unclear and recommended further development of the evidence.

On November 18, 2014 OWCP referred appellant to Dr. Mark Klein, a Board-certified neurosurgeon, for a second opinion. In a November 18, 2014 report, Dr. Klein indicated that, pursuant to the A.M.A., *Guides*, appellant had four percent whole person impairment. He noted that he could not determine what table Dr. Jamshidi referenced to find 60 percent permanent impairment. In a March 24, 2015 clarification, Dr. Klein indicated that appellant's four percent permanent impairment of the L4 nerve root represented four percent impairment of the left lower extremity pursuant to Table 2 of *The Guides Newsletter, Rating Spinal Nerve Impairment* (July/August 2009) (*The Guides Newsletter*).

In an April 10, 2015 report, OWCP's medical adviser concurred that appellant had four percent impairment of the left lower extremity pursuant to Table 2 of *The Guides Newsletter*.

On June 4, 2015 OWCP issued a schedule award for four percent permanent impairment of the left lower extremity.

Appellant requested a review of the written record by an OWCP hearing representative on June 23, 2015. By decision dated November 16, 2015, OWCP's hearing representative remanded the case for OWCP to obtain clarification from Dr. Klein. She determined that Dr. Klein should further explain his rationale for finding that appellant had four percent left lower extremity permanent impairment considering that he found that appellant had a normal neurological examination with normal sensory and motor testing. The hearing representative directed OWCP to ask Dr. Klein to discuss if the claimant's diagnostic and clinical findings supported radiculopathy of one or more lower extremities.

On December 16, 2015 OWCP asked Dr. Klein to clarify his opinion by answering certain questions concerning his impairment rating. In a December 17, 2015 response, Dr. Klein reported that he would not be issuing an addendum, and that he stood by his prior reports.

On February 17, 2016 OWCP referred appellant for a second opinion with Dr. Chester DiLallo, a Board-certified orthopedic surgeon.

On March 25, 2016 appellant underwent a second opinion evaluation by Dr. DiLallo. Dr. DiLallo conducted a physical examination and reviewed appellant's medical records. He determined that appellant had 14 percent impairment of the whole person after evaluating appellant's impairment utilizing Chapter 17 of the A.M.A., *Guides*. Dr. DiLallo noted that he rated appellant's permanent impairment using the diagnosis-based impairment (DBI) methodology pursuant to Table 17-4 of the Lumbar Spine Regional Grid for motion segment lesions, which included a single level intervertebral disc herniation with surgery and residual radiculopathy. He indicated that, pursuant to Table 17-8, this equaled a default value of 12. Dr. DiLallo noted that grade modifiers of 1 for sensory and motor deficit and a grade modifier of 4 for his Pain Disability Questionnaire would yield a final adjustment of plus 2, giving him the maximum value of 14 percent permanent impairment of the whole person. In a clarification

issued on April 19, 2016, he noted that pursuant to Table 15-11 of the A.M.A., *Guides* 12 percent whole person impairment equals an upper extremity impairment of 20 percent. In an April 20, 2016 further clarification, Dr. DiLallo noted that all calculations were regarding radiation to the left lower extremity, not the upper extremity.

By letter dated April 26, 2016, OWCP asked its OWCP medical adviser to provide an impairment rating. In an April 27, 2016 response, the medical adviser applied *The Guides Newsletter*. He indicated that appellant had zero percent permanent impairment of the right lower extremity resulting from the October 17, 2012 employment injury. The medical adviser determined that appellant had one percent impairment of the left lower extremity for residual problems with mild pain/impaired sensation from the left S1 lumbar radiculopathy. He noted that appellant had five percent permanent impairment of the left lower extremity for residual problems with mild motor weakness from the left L5 lumbar radiculopathy. The medical adviser noted that this resulted in six percent permanent left lower extremity permanent impairment.

On May 5, 2016 OWCP issued appellant a schedule award for an additional two percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. It noted that he was previously issued a schedule award for four percent permanent impairment of the left lower extremity on June 5, 2015.

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, 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 insure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ 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 and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰

Although the A.M.A., *Guides*, includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.¹¹ A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.¹²

In 1960 amendments, FECA was modified to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant would be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹³

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹⁴ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹⁵ In particular, 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.¹⁶

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.¹⁷

⁹ A.M.A., *Guides* 494-531.

¹⁰ *Id.* at 521.

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *M.P.*, Docket No. 14-777 (issued July 18, 2014).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, n.5 (January 2010).

¹⁵ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁶ *R.L.*, Docket No. 14-1479 (issued October 28, 2014); *see also E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

ANALYSIS

OWCP accepted appellant's claim for sprain of the lumbar region of the back, aggravation of lumbar stenosis, and displacement of lumbar intervertebral disc without myelopathy. It issued a schedule award for six percent permanent impairment to appellant's left lower extremity.

Dr. Klein, the second opinion physician, used rating methodology pursuant to *The Guides Newsletter*. However, he failed to clearly explain his rationale and, after being requested to clarify his findings, he chose not to. As Dr. Klein refused to clarify his report, OWCP properly referred appellant for another second opinion.

Dr. DiLallo, the second referral physician, indicated that appellant had 14 percent whole person impairment or 20 percent impairment of the lower extremity based on his calculations utilizing Table 17 of the A.M.A., *Guides* which pertains to impairment of the spine. However, a schedule award is not payable under FECA for an injury to the spine.¹⁸ The Board has acknowledged the use of *The Guides Newsletter* as the proper methodology to provide a uniform standard applicable for each claimant for extremity impairment originating in the spine.¹⁹

There is no evidence of record that properly applies the A.M.A., *Guides* and indicates that appellant is entitled to a greater award. Appellant's treating physician, Dr. Jamshidi, indicated that appellant had 60 percent permanent impairment. In reaching this conclusion, he referred to Table "29,34" of the A.M.A., *Guides*. However, this table does not exist, and no other physician of record has been able to determine how Dr. Jamshidi reached his conclusion.

The Board finds that OWCP properly based its decision on the opinion of OWCP's medical adviser who properly applied *The Guides Newsletter*, and determined that appellant had six percent permanent impairment of the left lower extremity. As OWCP's medical adviser properly noted, appellant had one percent impairment of the left lower extremity for residual problems with mild pain/impaired sensation from the left S1 lumbar radiculopathy and five percent impairment of the left lower extremity for residual problems with mild pain/impaired sensation of the left L5 lumbar radiculopathy.²⁰ This equaled six percent permanent impairment of the left lower extremity.

Appellant may request an increased schedule award at any time based on evidence of 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 greater than six percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

¹⁸ *Supra* note 11.

¹⁹ *See E.D., supra* note 16; *D.S., supra* note 16.

²⁰ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 5, 2016 is affirmed.

Issued: July 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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