United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 21-0193**
	)	**Issued: December 7, 2021**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 16, 2020 appellant filed a timely appeal from an October 5, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than five percent permanent impairment of the right lower extremity and five percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On November 21, 2000 appellant, then a 38-year-old maintenance worker, filed a notice of traumatic injury (Form CA-1) alleging that on October 30, 2000 he sustained a lumbar injury as a result of a dump truck incident in the performance of duty. OWCP accepted the claim for sprain of lumbosacral joint ligament, displacement of lumbar intervertebral disc without myelopathy, intervertebral disc disorder with myelopathy, lumbar region, and lumbar spondylosis with myelopathy. It paid him wage-loss compensation on the periodic rolls from June 16, 2002 until July 12, 2003.

On March 11, 2002 appellant underwent an authorized lumbar interbody fusion at L5-S1.

On March 14, 2003 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated July 15, 2003, OWCP granted appellant a schedule award for a combined 10 percent permanent impairment of the lower extremities, which was based on 5 percent permanent impairment of the right lower extremity and 5 percent permanent impairment of the left lower extremity. The period of the award ran for 28.80 weeks from July 13, 2003 to January 30, 2004.

On February 14, 2017 appellant filed a claim for an increased schedule award (Form CA-7). By decision dated December 21, 2018, OWCP denied appellant's claim for an increased schedule award.

On December 23, 2019 appellant requested reconsideration and submitted medical evidence in support of an increased schedule award.

In an October 11, 2019 report, Dr. Eric Dawson, an orthopedic surgery specialist, examined appellant and referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[2] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). He noted that on examination appellant had classic signs of lumbar disc impingement, as well as nerve impingement. Dr. Dawson explained that the electromyography (EMG) scan and nerve conduction velocity (NCV) studies were direct measurements of nerve dysfunction and that he found sensory and motor impingement. He referred to Table 17-4, page 570, of the A.M.A., *Guides,* Lumbar Spine Regional Grid, noted that appellant had findings of radiculopathy, and opined that appellant had 13 percent whole body impairment, which converted to 32.5 percent permanent impairment of the lower extremities.

An October 23, 2019 magnetic resonance imaging (MRI) scan, read by Dr. William Prominski, a Board-certified diagnostic radiologist, revealed findings of post laminectomy and posterior fusion of the L5-S1 level with bilateral pedicle screws in place. Findings included mild generalized disc bulging from L2-4 with no focal disc protrusion, L4-5 mild disc protrusion on the left with impingement of the thecal sac and lateral recess on the left, and additional facet joint and

[2] A.M.A., *Guides* (6th ed. 2009).

ligamentous hypertrophy contributing to moderate to marked central canal stenosis and moderate bilateral neural foraminal impingement.

On January 8, 2020 OWCP requested that Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), review Dr. Dawson's October 11, 2019 report.

In a January 9, 2020 report, Dr. Harris noted that he had reviewed the medical evidence and concluded that appellant should be referred for a second opinion examination to obtain documented findings on examination for rating appellant's spinal nerve impairments in accordance with *The Guides Newsletter*.

On February 6, 2020 OWCP referred appellant for a second opinion examination with Dr. John Barry, a Board-certified orthopedic surgeon.

In an April 16, 2020 report, Dr. Dawson noted findings of lumbar discopathy with neural radiculopathy, both motor and sensory, with some decompensation.

In a report dated May 21, 2020, Dr. Barry noted appellant's history of injury and treatment. He conducted a physical examination and reported findings, noting that appellant's straight leg raise was positive bilaterally, with positive bowstring reproducing complaints of lower extremity pain and numbness down to the toes. Dr. Barry also noted that the neurological examination showed 1+ deep tendon reflexes at the knees and ankles, and the motor examination showed no focal motor weakness. He determined that there was no evidence of measurable atrophy in any of the muscle groups in the lower extremities, and light touch sensory examination revealed a decrease bilaterally from the knees to the tips of the toes in a stocking, nonphysiologic distribution. Dr. Barry advised that appellant reached maximum medical improvement (MMI) on May 21, 2020, the date of his examination. He referred to *The Guides Newsletter,* page 3, related to intervertebral disc herniation at a single level with documented radiculopathy,[3] and assigned a Class of Diagnosis (CDX) 2, with a rating range of 14 to 25 percent. Dr. Barry used the L5 grid for the right lower extremity, and found that the C Grade of CDX 2, equated to 16 percent lower extremity impairment (LEI) (Table 2, page 7). He assigned a grade modifier for functional history (GMFH) of 1 for mild problem, a grade modifier for clinical studies (GMCS) for electrodiagnostic studies was 1, and he noted the grade modifier for physical examination (GMPE) was not used because it determined the impairment class. Dr. Barry explained this resulted in a -2, moving the grade to an A, with 14 percent right lower extremity impairment rating. He noted that the calculation was identical for the left, opposite extremity. Dr. Barry determined that appellant had 14 percent impairment of the right lower extremity and 14 percent impairment of the left lower extremity. He completed a permanent impairment worksheet and noted that appellant had a combined lower extremity permanent impairment of 28 percent.

In a May 28, 2020 report, Dr. Dawson noted findings of lumbar discopathy with neural radiculopathy, both motor and sensory components, which were quite severe and slightly worsening.

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[3] Dr. Barry indicated that it was documented on EMGs.

On June 16, 2020 OWCP referred the case record to the DMA, Dr. Harris, and requested that he review the prior medical reports and provide an opinion as to the extent of appellant's permanent impairment.

In a June 22, 2020 report, Dr. Harris noted that he reviewed the statement of accepted facts (SOAF), the medical evidence, and the May 21, 2020 report of the second opinion physician. He also noted that he utilized the A.M.A., *Guides* and *The Guides Newsletter*. Regarding the diagnosis-based impairment (DBI) method for the lumbar spine, the DMA noted that appellant did not have any neurologic deficit in the right or left lower extremity consistent with lumbar radiculopathy. Dr. Harris explained that this finding was consistent with severity 0 in Table 16-11, Sensory and Motor Severity, on page 533 of the A.M.A., *Guides*, and with Class 0 impairment in the Spinal Nerve Impairment: Lower Extremity Impairments in Table 2 of *The Guides Newsletter*. He opined that appellant had zero percent right and left lower extremity impairment for lumbar radiculopathy based on the DBI methodology.

Regarding the range of motion (ROM) method, the DMA explained that the A.M.A., *Guides* did not allow for an impairment rating to be calculated on the ROM method for appellant's diagnosed condition, as it did not contain an asterisk in the DBI Grid.

Dr. Harris opined that appellant had sustained no increase in the permanent impairment of the right and left lower extremities, and that appellant had zero percent impairment of the right lower extremity and zero percent impairment of the left lower extremity. The DMA also noted that Dr. Barry did not calculate appellant's impairment based on the correct methodology for neurologic deficits in the lower extremities. He explained that Dr. Barry utilized whole person impairment based on the DBI method, which would not be consistent with the recommended methodology for calculating a neurologic deficit in *The Guides Newsletter*.

In an August 14, 2020 report, Dr. Barry noted that he had reviewed Dr. Harris' report and determined that his "original opinion stands." He opined that appellant had 14 percent permanent impairment of the right and the left lower extremities in accordance with the A.M.A., *Guides* and *The Guides Newsletter*.

On September 8, 2020 OWCP requested clarification from the DMA.

In a September 14, 2020 report, the DMA reiterated that appellant did not have any neurologic deficit in the right or left lower extremity consistent with lumbar radiculopathy and that this was consistent with a severity of zero in Table 16-11, Sensory and Motor Severity, page 533, of the A.M.A., *Guides* and a Class 0 impairment based on the Spinal Nerve Impairment Lower Extremity Impairments in Table 2 of *The Guides Newsletter*. The DMA opined that appellant had zero percent right and left lower extremity impairment for lumbar radiculopathy. Additionally, he reiterated that the ROM method was not applicable because appellant's diagnosis did not contain an asterisk.

By decision dated October 5, 2020, OWCP denied modification of the December 21, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

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. However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[8] The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated into OWCP's procedures.[9]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[10]

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[4] *Supra* note 1.

[5] 20 C.F.R. § 10.404.

[6] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

[7] *See E.G.,* Docket No. 19-1081 (issued September 24, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[9] *Supra* note 6 at Chapter 3.700, Exhibit 4 (January 2010).

[10] *See supra* note 6 at Chapter 2.808.6(f) (March 2017).

ANALYSIS

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

Dr. Harris found that the permanent impairment ratings provided by Dr. Dawson, the treating physician, and Dr. Barry, OWCP's second opinion physician, were based on whole body impairment, converted to a lower extremity permanent impairment. Dr. Dawson, in fact, related that he had converted appellant's whole body permanent impairment, to a lower extremity rating. While Dr. Barry indicated that he rated appellant's lower extremity permanent impairment under *The Guides Newsletter*, he found appellant had a CDX 2 impairment; however, *The Guides Newsletter* does not provide for a CDX 2 rating for lumbar nerve impairment, his rating was, therefore, not based on *The Guides Newsletter*. 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.[11] The Board, therefore, finds that the probative value of these reports is diminished.

Both Dr. Dawson and Dr. Barry, however, reported findings which included lumbar radiculopathy. In his October 11, 2019 and April 6, 2020 reports, Dr. Dawson related that appellant had lumbar spine impingement, and that his EMG and NCV studies confirmed motor and sensory impingement. Dr. Barry, the second opinion physician, also documented findings of radiculopathy in his May 21, 2020 report, and noted that appellant's physical examination displayed sensory loss.

Dr. Harris, serving as a DMA, noted his review of the findings made by Dr. Dawson and Dr. Barry, and determined that appellant had no right or left lower extremity permanent impairment. The DMA advised that appellant had no neurologic deficit of the right or left lower extremity consistent with radiculopathy and, therefore, that appellant had no permanent impairment of either lower extremity. However, the DMA failed to base his opinion as to permanent impairment on the physical examination findings set forth in the reports of Dr. Dawson and Dr. Barry, or to provide a rationalized basis for discounting the documented findings of radiculopathy made by the treating physician and the second opinion physician.

The case must, therefore, be remanded to OWCP for further development to determine whether appellant is entitled to an increased schedule award. Upon remand, OWCP shall provide a SOAF and a complete copy of the medical record, including the prior physicians' rating reports, to a second opinion physician who shall perform a physical examination and thereafter properly evaluate the findings and provide a medical rationale explaining whether appellant has permanent impairment of either lower extremity due to lumbar radiculopathy. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding appellant's claim for an increased schedule award.

CONCLUSION

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

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[11] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see C.S.*, Docket No. 19-0851 (issued November 18, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: December 7, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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