United States Department of Labor
Employees' Compensation Appeals Board

V.B., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Chamblee, GA, Employer**	)	**Docket No. 20-0863** **Issued: February 19, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

<u>Before:</u>
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10, 2020 appellant filed a timely appeal from a February 27, 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 greater than five percent permanent impairment of each lower extremity, for which he received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 10, 2013 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left leg and low back while in the performance of duty. OWCP accepted the claim for a sprain of the left lumbar spine and displacement of a lumbar intervertebral disc without myelopathy. On June 19, 2013 appellant underwent a left hemilaminotomy at L4 and L5 and a left L4-5 partial foraminotomy and decompression of the nerve roots at L4 and L5. OWCP paid him wage-loss compensation for total disability from April 7 to December 2, 2013, when he returned to full-time modified employment.

An electromyogram and nerve conduction velocity study (EMG/NCV) performed on February 27, 2014 revealed severe radiculopathy at L5-S1.

On November 19, 2014 Dr. Plas T. James, an orthopedic surgeon, performed a posterior lumbar interbody fusion at L4-5. OWCP paid appellant wage-loss compensation for total disability beginning that date. On October 20, 2015 he elected to receive retirement benefits in lieu of FECA benefits effective November 20, 2015.

On January 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated February 2, 2016, OWCP requested that Dr. James evaluate whether appellant had a permanent impairment as a result of his accepted employment injury in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*).[3]

On February 9, 2016 Dr. James advised that appellant had reached maximum medical improvement (MMI) on September 11, 2015. He opined that according to Table 17-4 on page 570 of the A.M.A., *Guides*, appellant had 11 percent whole person impairment due to an L4-5 disc herniation treated with a decompression and fusion.

In a February 11, 2016 report, Dr. James discussed appellant's complaints of weakness and numbness in his left leg and pain in his right leg. On examination he found normal sensation of the bilateral lower extremities, 4/5 left hip strength, full motor strength in the remaining muscles, loss of range of motion of the spine, and a positive straight leg raise bilaterally. Dr. James diagnosed status post fusion at L4-5 and to rule out a recurrent herniated disc. He referred appellant for a lumbar magnetic resonance imaging (MRI) scan.

On March 8, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the evidence and found that appellant had one percent

[2] Docket No. 17-1326 (issued October 19, 2017).

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

permanent impairment of the left lower extremity according to *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the A.M.A., *Guides*. Dr. Harris opined that appellant had no impairment of the right lower extremity.

An April 22, 2016 lumbar MRI scan study performed by Dr. Richard Woodcock, a Board-certified diagnostic radiologist, demonstrated surgical scarring around the left foramen, subarticular recess, and left L4 root and foraminal narrowing at L3-4 on the right resulting from facet arthropathy and a small herniation.

In letters dated June 2 and July 19, 2016, OWCP requested that Dr. James review the report from Dr. Harris and provide an impairment evaluation pursuant to the A.M.A., *Guides*.

On July 22, 2016 Dr. James advised that the April 22, 2016 MRI scan had revealed scar tissue or disc material blocking the L4-5 nerve root and foraminal narrowing at L3-4 due to a disc herniation and facet arthropathy. He provided findings on examination and opined that appellant had seven percent permanent impairment of the lower extremity as a result of sensory and motor dysfunction under the sixth edition of the A.M.A., *Guides*.

By decision dated August 10, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award ran for 2.88 weeks from February 9 to 29, 2016.

On August 17, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. At the telephonic hearing, held on March 1, 2017, appellant related that he experienced numbness in his left leg, tingling in the left foot, and problems with his right leg.

By decision dated April 5, 2017, OWCP's hearing representative affirmed the August 10, 2016 decision.

Appellant appealed to the Board. By decision dated October 19, 2017, the Board set aside the April 5, 2017 decision.[4] The Board found that OWCP had failed to refer Dr. James' July 22, 2016 report for review by a DMA in accordance with it procedures.

On November 1, 2017 Dr. Harris reviewed the July 22, 2016 report from Dr. James and found that, for the right and left lower extremity, appellant had two percent permanent impairment due to mild motor weakness from L4 radiculopathy and three percent permanent impairment due to mild motor weakness from L5 radiculopathy. He combined the impairment ratings from L4 and L5 and concluded that appellant had five percent permanent impairment of each lower extremity. Dr. Harris opined that he had reached MMI on July 22, 2016.

By decision dated January 11, 2018, OWCP granted appellant schedule award compensation for five percent permanent impairment of the right lower extremity and an additional

[4] *Supra* note 2.

four percent permanent impairment of the left lower extremity, for a total five percent permanent impairment. The period of the award ran for 25.92 weeks from July 22, 2016 to January 19, 2017.

In a report dated September 21, 2018, Dr. James discussed appellant's history of the January 10, 2013 employment injury and his subsequent lumbar surgeries. He advised that appellant continued to have pain in his lower back and bilateral leg pain, greater on the left, and left lower extremity numbness. Dr. James attributed his condition to his accepted employment injury and resulting surgical treatment. He opined that appellant had reached MMI. In a letter of even date, Dr. James asserted that appellant had 17 percent whole body impairment according to Table 17-4 of the A.M.A., *Guides*.

On October 29, 2018 appellant filed a claim for an increased schedule award (Form CA-7).

In a November 5, 2018 letter, OWCP advised Dr. James that appellant had previously received schedule awards for five percent permanent impairment of each lower extremity. It requested that he provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides.*

In an April 10, 2019 response, Dr. James again discussed appellant's current symptoms of back pain, left greater than right leg pain, and left leg numbness. He found that appellant had 11 percent permanent impairment of the lower extremity due to motor deficits and four percent permanent impairment of the lower extremity due to sensory deficits, for 15 percent permanent impairment of the lower extremity. Dr. James opined that appellant had obtained MMI, but might require additional lumbar surgery in the future.

On May 8, 2019 Dr. Harris advised that Dr. James had failed to indicate whether the 15 percent permanent impairment was for the right or left lower extremity or whether it was a bilateral lower extremity impairment rating. He further noted that Dr. James had not provided objective examination findings. Dr. Harris requested that OWCP obtain clarification of his impairment rating.

In a July 22, 2019 response to OWCP's request for clarification, Dr. James advised that, according to *The Guides Newsletter* and Table 16-12 on page 534 of the A.M.A., *Guides,* appellant had a class 1 grade B motor deficit of the L4, L5, and S1 nerve roots, which yielded six percent impairment of the right lower extremity. For the left lower extremity, he found six percent permanent impairment due to class 1, grade B motor deficits at L4, L5, and S1 and two percent permanent impairment due to class 1, grade B sensory deficits at L4, L5, and S1, for a total left lower extremity impairment of eight percent. Dr. James noted that December 27, 2017 electrodiagnostic testing had revealed chronic radiculopathy on the left at L5. He indicated that appellant had normal sensation to pinprick of the bilateral lower extremities and 4/5 strength of the bilateral hip flexors, quadriceps, hamstrings, anterior tibialis, and left hip abductors. Dr. James indicated the corresponding nerve root resulting in the loss of strength. He further noted that MRI scans obtain subsequent to appellant's surgery showed "adjacent-level disease at L3-4 in the form of facet arthropathy as well as a right-sided L3-4 disc herniation crowding the right L3 nerve root." Dr. James attributed the adjacent-level disc pathology to appellant's surgery to treat his accepted employment injury.

On August 13, 2019 Dr. Harris advised that the July 29, 2019 report from Dr. James was inconsistent as he had found normal pinprick sensation on examination, but provided an impairment rating for sensory deficits due to lumbar radiculopathy. He also noted that he had calculated appellant's impairment due to motor weakness using Table 16-12 on page 534 of the A.M.A., *Guides* rather than *The Guides Newsletter*. Dr. Harris recommended that OWCP obtain a second opinion evaluation regarding the extent of permanent impairment.

On September 16, 2019 OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion examination. It further authorized electrodiagnostic testing.

In a report received by OWCP on December 19, 2019, Dr. Doman reviewed the history of injury.[5] On physical examination, he found a negative straight leg raise, no atrophy, intact sensation, and normal reflexes. Dr. Doman asserted that appellant's subjective complaints failed to correlate with the objective findings. He diagnosed resolved lumbar sprain and a resolved herniated disc. Dr. Doman noted that a December 4, 2019 EMG study was normal, and advised that the EMG obtained by appellant's physician was unreliable. He opined that appellant's employment injury had resolved and that he had no permanent impairment under the A.M.A., *Guides* as he had "no nerve injury associated with his lumbar spine injury, which has been successfully treated with lumbar fusion."

An EMG and NCV study obtained on October 30, 2019 and interpreted by Dr. Barry J. McCasland, a Board-certified neurologist, demonstrated active and chronic left radiculopathy at L5 that had worsened when compared to a 2017 study.

Dr. Joseph E. Freschi, a Board-certified neurologist, interpreted electrodiagnostic testing performed on December 4, 2019 as normal.

On January 5, 2020 Dr. Harris reviewed the evidence of record, noting that October 30, 2019 electrodiagnostic testing showed left L5 radiculopathy while electrodiagnostic testing obtained on December 5, 2019 testing revealed normal findings. He opined that appellant had zero percent permanent impairment of each lower extremity based on Dr. Doman's October 8, 2019 examination as he had found no objective evidence of lumbar radiculopathy.

In a supplemental report dated January 25, 2020, Dr. Harris noted that appellant had previously received a schedule award for five percent permanent impairment of each lower extremity and advised that he had no increased impairment.

By decision dated February 27, 2020, OWCP denied appellant's claim for an increased schedule award.

[5] Dr. Doman's report is dated October 8, 2019; however, this appears to be inaccurate as he referenced a December 4, 2019 EMG study.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal regulation,[7] 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.[8] 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.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[10] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[13]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[14] Furthermore, the back is specifically excluded from the definition of

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

[8] 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* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

[10] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[11] *Id*. at 494-531.

[12] *Id*. at 411.

[13] *R.R.,* Docket No. 17-1947 (issued December 19, 2018); *R.V.,* Docket No. 10-1827 (issued April 1, 2011).

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.H.*, Docket No. 19-1788 (issued March 17, 2020); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

organ under FECA.[15] 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 from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.[16] 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.[17]

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.[18]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[19] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[20]

ANALYSIS

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

There is an unresolved conflict in the medical opinion evidence between Dr. James, appellant's treating physician, and Dr. Doman, OWCP's referral physician, regarding the extent of any permanent impairment of the lower extremities.

In a September 21, 2018 report, Dr. James referenced Table 17-4, Lumbar Spine Regional Grid, on page 570 of the A.M.A., *Guides* and opined that appellant had 17 percent permanent impairment of the whole body. However, as noted, neither FECA nor its implementing regulations

[15] *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[16] *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[17] *A.H., supra* note 14.

[18] *See supra* note 8 at Chapter 2.808.6(f) (March 2017).

[19] 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

[20] 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[21]

On April 10, 2019 Dr. James discussed appellant's symptoms of bilateral leg pain and left leg numbness and the findings on MRI scans. On July 22, 2019 he noted that electrodiagnostic testing performed on December 27, 2017 had revealed chronic left radiculopathy at L5 and that post-surgical MRI scans had shown L3-4 facet arthropathy and a disc herniation impinging the L3 nerve root. Dr. James advised that appellant had normal pinprick sensation on examination, but a loss of strength bilaterally in the hip flexors, quadriceps, hamstrings, anterior tibialis, and left hip abductors. He, referencing both *The Guides Newsletter* and Table 16-12 of the A.M.A., *Guides*, found that appellant had six percent permanent impairment of the right lower extremity due to a motor deficit at L4, L5, and S1 and eight percent permanent impairment of the left lower extremity due to motor and sensory deficits at L4, L5, and S1.

Electrodiagnostic testing performed October 30, 2019 showed active and chronic left radiculopathy at L5 that had worsened when compared to a 2017 study. Electrodiagnostic testing performed on December 4, 2019 yielded normal results.

OWCP subsequently referred appellant to Dr. Doman. In a report received December 19, 2019, Dr. Doman found no loss of sensation, a negative straight leg raise, and no atrophy. He diagnosed resolved lumbar sprain and a resolved herniated disc and noted that a December 4, 2019 EMG study was normal. Dr. Doman opined that appellant had no nerve injury due to his accepted employment injury and thus no permanent impairment under the A.M.A., *Guides*.

As noted above, if there is disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[22] Dr. James found positive objective findings of radiculopathy of the lower extremities resulting in more than five percent permanent impairment of each lower extremity while Dr. Doman found that appellant had no nerve injury and thus no impairment of either lower extremity. As there is an unresolved conflict in the medical evidence regarding whether appellant has more than five percent permanent impairment of each lower extremity due to his accepted employment injury, the case must be remanded to OWCP for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[23] After such further development as OWCP deems necessary, it shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

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

[21] *Supra* note 14.

[22] *See supra* note 19.

[23] *See C.B.*, Docket No. 20-0258 (issued November 2, 2020); *R.A.*, Docket No. 19-0288 (issued July 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2020 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: February 19, 2021
Washington, DC

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

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

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