

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

M.R., Appellant

and

U.S. PENITENTIARY, Atlanta, GA, Employer

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**Docket No. 12-998
Issued: November 15, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 5, 2012 appellant filed a timely appeal from an October 13, 2011 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 over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule award.

FACTUAL HISTORY

Appellant, a correctional officer, sustained an injury on July 26, 1989 as a result of his employment. OWCP accepted his claim for a contusion of the back and lumbosacral strain. It

¹ 5 U.S.C. § 8101 *et seq.*

² This case was previously before the Board, Docket No. 11-1390 (issued December 21, 2011), but appellant requested that the appeal be dismissed so he could pursue a request for reconsideration before OWCP.

also accepted five other claims for back injury, a claim for right thumb strain, as well as a claim for bilateral shoulder injury and carpal tunnel syndrome.

On February 17, 2009 appellant filed a claim for a schedule award. On April 8, 2010 OWCP referred him to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a May 7, 2010 report, Dr. Rojas provided a lower extremity evaluation under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter, A.M.A., *Guides*). After providing a description of appellant's factual and medical history, which included his history of injury, he diagnosed appellant with L5-S1 chronic radiculopathy stemming from repeated multiple lumbar contusions and strains.³ Based on the regional grid, nerve involvement, Dr. Rojas assigned appellant to class 0 as there was no objective sensory or motor deficit.⁴ As the examination was devoid of any evidence to support a lumbar radiculopathy or nerve impingement, he concluded that he could find no impairment in the lower extremities caused by the lumbar sprain. Dr. Rojas also stated that appellant had reached maximum medical improvement, but was unable to provide a date as to when it had occurred.

On May 1, 2011 an OWCP medical adviser reviewed the record and concurred with Dr. Rojas's second opinion report, concluding that appellant had zero percent impairment of the lower extremities based on the sixth edition of the A.M.A., *Guides*.

In an October 13, 2010 decision, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not support a finding of permanent impairment.

On November 13, 2010 appellant requested an oral hearing.

By decision dated December 16, 2010, OWCP denied appellant's request for oral hearing as it was untimely filed. It also exercised its discretion and advised him that he could request reconsideration and submit new evidence to OWCP.

On January 27, 2011 appellant filed a request for reconsideration. Along with the application, he also submitted diagnostic reports.

OWCP denied appellant's request for reconsideration in a February 16, 2011 decision on the grounds that none of the medical reports reflected permanent impairment.

Appellant submitted another request for reconsideration on July 19, 2011.

In support of the request for reconsideration, appellant submitted a rating decision by the Department of Veterans Affairs dated June 17, 2011 and a medical report from Dr. Wilfredo Rodriguez, a Board-certified physician, dated March 16, 2011. Dr. Rodriguez diagnosed lumbar strain, lumbar L5-S1 radiculopathy affecting left lower extremity and lumbar disc herniation at

³ Dr. Rojas also diagnosed appellant with bilateral knee osteoarthritis, but deemed it unrelated to the work injury.

⁴ A.M.A., *Guides* (6th ed. 2009), pp. 534-36.

the L5-S1 level. He stated that appellant had a clinical history of lumbar strain with job-related aggravation of his condition and that appellant also had lumbar radiculopathy affecting his lower extremities, mainly left sided. Based on clinical findings as well as by Table 17-4 of the A.M.A., *Guides* (6th ed.), Dr. Rodriguez concluded that appellant had a whole person impairment of 11 percent due to a lumbar intervertebral disc herniation, with a documented radiculopathy. In his addendum report dated May 12, 2011, he further concluded that appellant had a 13 percent impairment of the lower extremity due to his right knee medial and lateral partial meniscectomy.

In its October 13, 2011 decision, OWCP denied appellant's claim, stating that the medical evidence submitted was insufficient to warrant modification of the October 13, 2010 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.⁵

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 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.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹

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. Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁰

ANALYSIS

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

⁵ See *Bobbie F. Cowart*, 55 ECAB 476 (2004).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

Dr. Rojas initially found in his May 7, 2010 report that appellant had L5-S1 radiculopathy from repeated lumbar contusions and strains. Appellant has accepted claims for back contusion and lumbar strain. However, Dr. Rojas also concluded that appellant did not have a ratable permanent impairment as a result of these accepted conditions. An OWCP medical adviser reviewed Dr. Rojas' report and concurred with his findings.

In support of a request for reconsideration, appellant submitted reports from Dr. Rodriguez.

Dr. Rodriguez noted that appellant had an employment-related lumbar strain, with job-related aggravation, as well as lumbar radiculopathy affecting his lower extremities. The Board has long held that a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the spine.¹¹ Dr. Rodriguez further attempted to rate appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*, and concluded that appellant had an 11 percent impairment of the whole person due to disc herniation and lumbar radiculopathy. OWCP's procedure manual describes the procedure to be followed when appellant submits his evidence in support of a schedule award. Its procedure manual provides that the claims examiner will ask OWCP's district medical adviser (DMA) to evaluate cases when the case appears to be in posture for a schedule award determination.¹²

In this case, OWCP did not refer Dr. Rodriguez's reports to the DMA. As these reports contained findings pertinent to appellant's accepted lumbar conditions, as well as findings relevant to appellant's diagnosed lumbar radiculopathy, these reports should have been referred to the DMA. The DMA should have provided a medical opinion as to whether the lumbar radiculopathy was causally related to the accepted injuries, and if so, whether appellant had any impairment of the lower extremities causally related to the radiculopathy, given the findings in the reports from Dr. Rodriguez.

The Board therefore finds that this case is not in posture for decision as the record should have been sent to a DMA for review after receipt of the reports from Dr. Rodriguez.

CONCLUSION

The Board finds that this case is not in posture for decision. After such further development as necessary, OWCP shall issue an appropriate decision.

¹¹ See *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: November 15, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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