United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 14-920**
	)	**Issued: August 19, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Valdosta, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2014 appellant, through his attorney, filed a timely appeal from a January 23, 2014 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 issue in this case.

ISSUE

The issue is whether appellant met his burden of proof to establish more than two percent impairment of the left leg or eight percent impairment of the right leg, for which he received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a September 21, 2009 decision, the Board found the case was not in posture for decision with regard to whether appellant established that his preexisting degenerative disc condition was aggravated by his lifting activities at work. The Board remanded the case to OWCP for further medical development. The facts of the case as contained in the prior decision are incorporated by reference.

On December 16, 2009 OWCP accepted the claim for aggravation of a degenerative lumbosacral intervertebral disc. On January 5, 2010 appellant claimed a schedule award. In a July 18, 2011 decision, OWCP denied a schedule award, finding that the weight of the evidence supported that there was no permanent impairment. It noted that the June 29, 2011 report of Dr. Douglas Hein, a Board-certified orthopedic surgeon and an OWCP referral physician, determined that appellant had no ratable impairment of the legs. Appellant's attorney requested a telephonic hearing, which was held on November 14, 2011. By decision dated February 16, 2012, an OWCP hearing representative found that the evidence did not support that appellant sustained permanent impairment.

On May 23, 2012 appellant's attorney filed a new request for a schedule award, and enclosed a May 18, 2012 report from Dr. William Grant, a Board-certified internist,[3] who stated that the February 16, 2012 decision of the hearing representative was incorrect. Dr. Grant explained that he spent several minutes taking a history and performing a physical examination of appellant. He had explained that appellant had paresthesias that radiated in an L4-5 distribution.[4] Dr. Grant utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) hereinafter A.M.A., *Guides* and *The Guides Newsletter*,[5] noting that he took a course presented by one of the principal authors of the sixth edition of the A.M.A., *Guides*. He did not provide an impairment rating.

On November 15, 2012 OWCP requested that an OWCP medical adviser review the medical evidence of record to determine whether appellant had any permanent impairment of the lower extremities. On November 16, 2012 he recommended a second opinion examination.

On April 22, 2013 OWCP referred appellant to Dr. George Hochreiter, a Board-certified orthopedic surgeon, for a second opinion. In a May 13, 2013 report, Dr. Hochreiter described appellant's history of injury and medical treatment. On examination of the lumbar spine, appellant was mildly tender over the sacroiliac joints and nontender over the lumbar spine.

[2] Docket No. 09-529 (issued September 21, 2009).

[3] Dr. Grant had previously provided an impairment rating of 14 percent for the right and left lower extremity, or 26 percent bilateral impairment. However, in the February 16, 2012 OWCP hearing representative decision, OWCP found that the report of the second opinion physician was entitled to the weight of the evidence.

[4] April 23, 2012 nerve conduction studies and an electromyogram testing accompanied Dr. Grant's report. This report noted moderate-to-severe right L5 radiculopathy, moderate left L5 radiculopathy and moderate right S1 radiculopathy.

[5] Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., Chicago, IL), July/August 2009.

Appellant was tender over both sciatic notches but there was no evidence of muscle spasm. Range of motion was limited with forward flexion of 30 degrees, backward extension of 15 degrees, side bending, left and right of 20 degrees, and rotation to the left and right of 40 degrees. Neurological examination of the legs showed a decrease in sensation over the plantar aspect of both feet; some mild weakness of the posterior tibialis on the right; mild weakness of the foot flexors and depressed but equal deep tendon reflexes bilaterally. Dr. Hochreiter diagnosed aggravation of degeneration of lumbar and lumbosacral disc, lumbar spine degenerative disc disease and spinal stenosis at L4-5.

In rating impairment, Dr. Hochreiter referred to the July/August issue of *The Guides Newsletter*,[6] noting the maximum impairment allowed for sensory and motor loss of the lower extremity and that all impairment values were class 1. Dr. Hochreiter referred to Table 16-8 of the A.M.A., *Guides*[7] for clinical studies adjustment, and determined that that nerve conduction study (NCS) and electromyography (EMG) testing were a grade modifier 1. Under Table 16-11,[8] for sensory and motor severity, he found that appellant was mild for severity 1. Under Table 16-6[9] for functional history adjustment, Dr. Hochreiter found that appellant was grade modifier 1. Based upon his examination, appellant had a mild sensory loss bilaterally involving both the L5 and S1 nerve roots. Dr. Hochreiter referred to *The Guides Newsletter*, Table 2, and advised that this resulted in one percent impairment for each nerve root, or two percent to each lower extremity.[10] For motor deficit, he found mild weakness of the right posterior tibialis as well as the right postflexors. This involved the right L5 and S1 nerve roots and accounted for three percent loss at each level or a total loss of six percent for motor loss to the right leg. Dr. Hochreiter indicated that as found above, the EMG/NCS would give a grade modifier 1 and the functional history would be a grade modifier of 1. Since physical examination was used to establish motor and sensory deficits, there was no grade modifier for physical examination and thus no adjustment resulting in a final grade of C. Dr. Hochreiter advised that adding the four percent for bilateral lower extremity sensory loss with the six percent for motor function loss, the final impairment of both lower extremities would be 10 percent.

On May 24, 2013 OWCP asked an OWCP medical adviser to review Dr. Hochreiter's impairment rating.[11]

In a May 30, 2013 report, Dr. James W. Dyer, a medical adviser, noted that appellant had chronic degenerative disc disease at the L4-5 and L5-S1 levels with moderate right L5 and left L5 radiculopathy and moderate right S1 radiculopathy. He noted that Dr. Hochreiter found decreased sensation in the plantar aspect of both feet with mild weakness of the right posterior

[6] *Id*.

[7] A.M.A., *Guides* 520.

[8] *Id.* at 533.

[9] *Id.* at 516.

[10] Dr. Hochreiter also included bilateral impairment ratings.

[11] On May 24, 2013 OWCP obtained a report from a medical adviser who stated that Dr. Hochreiter had properly applied the A.M.A., *Guides.* Dr. Hochreiter did not provide any application of *The Guides Newsletter*.

tibialis and right post flexors. Under *The Guides Newsletter*, Dr. Dyer explained that he assigned one percent impairment for mild sensory deficit of the right and left at L5 and S1 nerve root, which was equal to two percent to each lower extremity. With regard to motor deficit, he described a mild weakness on the right side equal to three percent of each nerve root at L5 and S1 or a total of six percent impairment due to motor loss for the right leg. Dr. Dyer added the two percent sensory loss of the L5 and S1 roots with six percent for motor loss at the L5 and S1 levels, to total eight percent impairment to the right leg. Regarding the left leg, he noted that appellant had two percent impairment for the L5 and S1 nerve roots for sensory deficits and no motor deficits. Dr. Dyer reiterated that appellant had an eight percent impairment to the right lower extremity and two percent to the left lower extremity. He noted that maximum medical improvement was reached on May 8, 2013.

By decision dated June 11, 2013, OWCP granted appellant schedule awards for two percent impairment of the left leg and eight percent impairment of right leg. The award covered a period of 28.8 weeks from May 8 to November 25, 2013. The decision was amended on July 16, 2013 to correct the weekly pay rate.

On June 18, 2013 appellant's attorney requested a hearing, which was held on October 28, 2013. At the hearing, he argued that Dr. Hochreiter's report was not interpreted properly. Counsel suggested that Dr. Hochreiter offered an impairment rating of 10 percent bilateral extremity impairment or a total impairment of 20 percent. He also questioned the validity of *The Guides Newsletter,* asserting that it was junk science.

By decision dated January 23, 2014, the hearing representative affirmed the July 16, 2013 decision.

LEGAL PRECEDENT

The schedule award provision of the FECA,[12] and its implementing federal regulations,[13] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[14] For decisions issued after May 1, 2009, the sixth edition will be used.[15]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Id*. at § 10.404(a).

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

based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[16] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[17]

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.[18] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[19]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[20]

ANALYSIS

OWCP accepted appellant's claim for aggravation of degeneration of lumbar or lumbosacral intervertebral disc. On June 11, 2013 appellant received a schedule award for a two percent impairment of the left lower extremity and an eight percent impairment of the right lower extremity.[21]

On May 23, 2012 appellant's attorney filed a new request for a schedule award and enclosed a report from Dr. Grant, who stated that the February 16, 2012 hearing representative decision was incorrect. He noted that his examination of appellant revealed paresthesias that radiated in the L4-5 distribution. Dr. Grant explained that he utilized the A.M.A., *Guides* and *The Guides Newsletter* and was trained in applying the A.M.A., *Guides*. The Board notes, however, that he did not provide any impairment rating. This report is insufficient to establish appellant's impairment.

In a May 13, 2013 report, Dr. Hochreiter, the second opinion physician, utilized the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to rate impairment. For both lower extremities, he noted that appellant had findings that were mild in severity to both lower extremities based on the L5 and S1 nerve roots. Dr. Hochreiter referred to *The Guides Newsletter*, Table 2 to determine that sensory loss represented one percent impairment at both

[16] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[17] A.M.A., *Guides* 521.

[18] *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[20] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[21] The decision was amended on July 16, 2013 to include the correct pay rate and affirmed on January 23, 2014.

the L5 and S1 nerve roots or two percent of each lower extremity. For motor loss, he explained that there was mild weakness of the right posterior tibialis and the right post flexors involving the right L5 and S1 levels. Dr. Hochreiter rated a three percent loss for both the L5 and S1 nerve roots or a total of six percent for motor impairment on the right. He found no motor loss to the left leg. Dr. Hochreiter added the impairment to each leg to rate a bilateral sensory loss of 4 percent and 6 percent motor loss to rate 10 percent impairment of the lower extremities.[22]

The file was then properly routed to Dr. Dyer who clarified the findings. Dr. Dyer opined that appellant had eight percent impairment to the right leg and two percent impairment to the left leg. He provided the calculations to show the impairment values for each individual lower extremity. Dr. Dyer rated the right lower extremity to include two percent for the sensory loss at the L5 and S1 nerve roots and six percent for motor loss at the L5 and S1 levels. This totaled eight percent to the right leg. For the left leg, Dr. Dyer noted that appellant had two percent impairment for the left L5-S1 nerve roots for sensory deficits but no motor deficit.[23] He concluded that appellant had two percent impairment of the left lower extremity and eight percent impairment of the right lower extremity, consistent with the examination findings of the second opinion physician.

The Board finds that the medical adviser's May 30, 2013 report properly applied the physical findings of Dr. Hochreiter to the A.M.A., *Guides*. The evidence establishes that appellant has no more than two percent impairment of the left lower extremity and eight percent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.[24]

Appellant may request a schedule award or increased schedule award based on evidence of a 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 more than two percent impairment of the left lower extremity or eight percent impairment of the right lower extremity, for which he received a schedule award.

[22] Dr. Hochreiter added impairments for each leg to reach a bilateral impairment percentage. However, FECA provides that lower extremity impairments are rated for each member; the two members are not totaled into one sum for lower extremity impairment. *See* 5 U.S.C. § 8107(c)(2); *R.B.*, Docket No. 13-904 (issued September 6, 2013).

[23] This is consistent with Dr. Hochreiter's report as he only listed findings of motor deficits on the right at the L5 and S1 nerve root levels.

[24] Appellant's counsel urged before OWCP that *The Guides Newsletter* constitutes junk science. 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. OWCP has adopted the sixth edition for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in *The Guides Newsletter* July/August 2009. The Board has recognized OWCP's adoption as proper in order to provide a uniform standard applicable to each claimant for a schedule award. *D.W.*, Docket No. 14-248 (issued June 17, 2014). *See Harry D. Butler*, 43 ECAB 839 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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