United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 12-523**
	)	**Issued: November 13, 2012**
DEPARTMENT OF ENERGY, WESTERN POWER ADMINISTRATION, Loveland, CO, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument September 18, 2012

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2012 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs (OWCP) dated July 14, 2011. 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 more than a three percent impairment of his right lower extremity, for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 42-year-old electrician, experienced pain in the right side of his lower back on June 10, 2009 while carrying equipment. He filed a claim for benefits on June 10, 2009, which OWCP accepted for herniated lumbar disc at L4-5.

On July 22, 2009 appellant underwent laminectomy, foraminotomy, medial facetectomy and discectomy surgery to repair his herniated disc at L4-5. The procedure was performed by Dr. Larry D. Tice, a Board-certified neurological surgeon, who stated that appellant was also experiencing lumbar radiculopathy.

In a May 28, 2010 report, Dr. Frederick Mosely, Board-certified in orthopedic surgery and appellant's treating physician, found that appellant had a 12 percent whole person impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) sixth edition. He stated that appellant had a class 2 lumbar spine impairment pursuant to Table 17-1 of the A.M.A., *Guides*, the table pertaining to rating whole person spinal impairment; this yielded an impairment range between 10 and 14 percent. Dr. Mosely advised that a class 2 impairment at Table 17-4, the lumbar spine regional grid for rating spinal impairments is defined as an intervertebral disc herniation at a single level with medically-documented findings with or without surgery and documented radiculopathy at the clinically appropriate level present at the time of examination. He noted that appellant had radiculopathy present prior to surgery and "questionable" radiculopathy findings postsurgery.

Applying the net adjustment formula at pages 582 to 584 of the A.M.A., *Guides*,[2] Dr. Mosely noted that appellant had an adjustment grade 2 modifier impairment for default impairment based on pain with normal activity, paresthesias with normal activity and alteration of some of his recreational activities because of the symptoms; a grade 2 modifier for physical examination adjustment due to decreased reflex in the right ankle and questionable loss of sensation or at least alteration of sensation in the 51 dermatome on the right side and nonverifiable radicular postsurgical complaints; and a grade 2 modifier for clinical studies due to positive magnetic resonance imaging (MRI) scan results, surgical notes which suggest the same and Dr. Melinda Gehrs' examination suggesting the possibility of radiculopathy, which did not require an MRI scan to verify it. He applied the formula set forth at Table 15-21, subtracted the grade modifier of 2 from Functional History (GMFH), Physical Examination and Clinical Studies (GMCS) to arrive at a 12 percent whole person impairment based on appellant's pathology and back findings. Dr. Mosely also noted that his pain disability questionnaire scale was 40, which was consistent with a class 2 impairment.

On May 19, 2010 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right lower extremity.

[2] A.M.A., *Guides* 582 to 584.

In a December 17, 2010 report, Dr. Ellen W. Price, an osteopath and treating physician, stated:

> "[Appellant] has tibial neuropathy, both sensory and motor. Using the A.M.A., *Guides*, page 536, Table 16-2,[3] would place him in the [c]lass [1], which would be one to four percent impairment since this is a mild sensory and motor problem. [Appellant] does have a [g]rade [m]odifier 1, which is a mild problem with functional history, physical examination and clinical study. [He] had a positive MRI scan and surgical notes indicated a free fragment, which would place him into that mild to moderate category. Appellant therefore is a grade category C, which would give him a two percent impairment. Combining two percent for sensory and two for motor is four percent. [Appellant] therefore has a four percent right lower extremity impairment. I also believe that [his] impairment rating done by Dr. Mosley is correct for his lumbar spine, which would equate to a 12 percent impairment utilizing his scale."

In a report dated March 8, 2011, received by OWCP on June 6, 2011, Dr. Tice stated:

> "[Appellant's] lower extremity impairment as related to his back with a herniated disc at L4-5, where using the lumbar spine regional grid Table 17-4 places him in the class 2 category and the physical examination grade 2 modifier would apply because of his positive straight leg raising and diminished sensation in his lower extremities. Additionally, with grade 1 modifier on the adjustment grid summary and grade zero modifier on the functional history adjustment, the impairment I would estimate [is] 12 percent related to the lower extremity. Using Table 17-4 class 2 and [Table] 17-2 for modifier would give 12 percent, using Table 17-10. I hope this explains my rating of 12 percent whole person impairment."

In a May 13, 2011 report, an OWCP medical adviser reviewed Dr. Price's report and asked her to submit a supplemental report explaining and discussing the specific tests she used to calculate her findings of sensory loss along the tibial nerve and S1 distribution pursuant to Table 16-11, page 533[4] of the A.M.A., *Guides*. He advised that Table 16-11 specifically indicated that the rating physician should test for light touch, sharp/dull and protective sensibility.

By letter dated May 16, 2011, OWCP advised Dr. Price that its medical adviser had reviewed her December 17, 2011 report. It asked her to submit a supplemental report providing the additional information he had requested.

In a May 25, 2011 report, Dr. Price explained how she calculated a four percent right lower extremity impairment under the A.M.A., *Guides* for a tibial nerve neuropathy, sensory and motor. She stated that she checked appellant's two-point discrimination, which was impaired, utilizing two needles and also did a light touch test using microfilament. Dr. Price performed

[3] *Id*. at 536.

[4] *Id*. at 533.

this procedure multiple times and found consistent results. She concluded that appellant had a 12 percent impairment utilizing Table 16-11, page 533 of the A.M.A., *Guides*.

In a report dated June 30, 2011, Dr. Morley Slutsky, a Board-certified orthopedic surgeon and OWCP's medical adviser, stated that Dr. Price found that appellant had tibial nerve neuropathy, sensory and motor. He stated, however, that none of the other physicians of record made similar findings. Dr. Slutsky advised that the medical records reflected that appellant had either L5 or S1 right-sided sensory radiculopathy. He stated that, pursuant to the July/August 2009 issue of *The Guides Newsletter*, proposed Table 2, an L5 moderate sensory deficit yielded a higher rating than that provided by a moderate S1 radiculopathy. Dr. Slutsky therefore relied on the right L5 sensory nerve, as it produced a higher rating of the two impairments. He stated that appellant's maximal strength effort in the lower extremities at maximum medical improvement was a five out of five; thus, he was not entitled to a rating for motor loss. Dr. Slutsky found that appellant had class 1, default grade C impairment for moderate right L5 sensory loss under proposed Table 2 of *The Guides Newsletter*, which yielded a three percent right lower extremity impairment.

Applying the net adjustment formula at page 521,[5] Dr. Slutsky advised that a class 1 impairment produced a functional history grade modifier 1; a clinical studies grade modifier of 0. Subtracting the diagnosis-based class 1 from a functional history grade modifier 1 produced a final, default impairment of 0; subtracting the diagnosis-based class 1 from a clinical studies grade modifier of 0 produced a final, net adjusted default impairment of negative 1. In accordance with the net adjustment formula, Dr. Slutsky moved the impairment one grade to the left of grade C (the default grade), for a final grade B and a final sensory, right lower extremity impairment of three percent based on sensory loss. As he found no motor loss, Dr. Price's two percent right lower extremity impairment for motor loss was discounted.

By decision dated July 14, 2011, OWCP granted appellant a schedule award for a three percent permanent impairment of the right lower extremity for the period December 17, 2010 to February 15, 2011, for a total of 8.64 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[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. 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

[5] *Id*. at 521.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

appropriate standard for evaluating schedule losses.[8] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[9]

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.[10] In 1960, amendments to FECA modified the schedule award provisions 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 may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[11]

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* "Rating Spinal Nerve Extremity Impairment using the Sixth Edition" (July/August 2009) is to be applied.[12]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH and if electrodiagnostic testing were done, GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[14]

ANALYSIS

OWCP accepted that appellant sustained the condition of herniated lumbar disc at L4-5. Appellant submitted the May 25, 2011 report from Dr. Price, his treating physician, who rated a four percent right lower extremity impairment under the A.M.A., *Guides* based on a tibial nerve neuropathy for sensory and motor loss. Dr. Price also found that he had a 12 percent whole person impairment. Dr. Slutsky, OWCP's medical adviser, reviewed her report and calculated that appellant had a three percent right lower extremity impairment. The Board finds that the

[8] *Id.*

[9] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[10] *Pamela J. Darling*, 49 ECAB 286 (1998).

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

[12] *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, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[13] A.M.A., *Guides* 533.

[14] *Id.* at 521.

weight of the medical evidence regarding appellant's right lower extremity impairment rests with the opinion of Dr. Slutsky, who provided an impairment rating in accordance with the protocols and tables of the sixth edition of the A.M.A., *Guides*.

In his June 30, 2011 report, Dr. Slutsky stated that appellant had a three percent right lower extremity impairment under Table 2, page 6, of *The Guides Newsletter* July/August 2009, for a moderate sensory deficit of the L5 root, grade C. He found that appellant was not entitled to Dr. Price's two percent right lower extremity impairment for motor loss based on her finding that appellant demonstrated maximal strength effort in his lower extremities testing. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment using the sixth edition" (July/August 2009) is to be applied.[15] The Board finds that Dr. Slutsky, OWCP's medical adviser, properly applied *The Guides Newsletter* to rate appellant's right lower extremity impairment and that his report constitutes the weight of medical opinion.

Dr. Price's May 25, 2011 report did not provide sufficient findings required to meet the standards for rating a lower extremity impairment for appellant's condition set forth in the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*. Her report does not provide adequate medical rationale in support of her opinion that appellant is entitled to a four percent schedule award for the right lower extremity.[16] OWCP properly determined that Dr. Price's report did not provide a basis for a schedule award under FECA.[17]

In his appeal to the Board, appellant asserts that he is entitled to an award for a greater right lower extremity impairment based on reports which indicated that he had a 12 percent whole person impairment. However, a schedule award is not payable under FECA based on whole person impairment.[18] The question of whether a claimant is entitled to a schedule award is a medical one. OWCP thoroughly reviewed the medical evidence of record and properly determined that it was not sufficient to establish greater than a three percent permanent impairment of the right lower extremity from appellant's accepted L4-5 herniated disc condition. The Board will affirm the July 14, 2011 decision.

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.

[15] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 12.

[16] *William C. Thomas*, 45 ECAB 591 (1994).

[17] The Board notes that a description of appellant's impairment must be obtained from his physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *See Peter C. Belkind*, 56 ECAB 580, 585 (2005).

[18] *N.M.*, 58 ECAB 273 (2007).

CONCLUSION

The Board finds that appellant has not established that he has more than a three percent impairment of his right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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