United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 12-422**
	)	**Issued: October 11, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2011 appellant, through his attorney, filed a timely appeal from July 21 and November 3, 2011 merits decisions 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.

ISSUES

The issues are: (1) whether appellant has sustained greater than a four percent impairment to his left lower extremity; and (2) whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 5, 1984 appellant, a 51-year-old clerk, injured his lower back while lifting heavy rags from the floor of the warehouse. He filed a claim for benefits, which OWCP accepted for lumbar strain and permanent aggravation of spondylolisthesis.

In a Form CA-7 dated July 23, 2009, appellant requested a schedule award based on a partial loss of use of his left lower extremity.

In a report dated October 27, 2009, Dr. Martin Fritzhand, appellant's treating physician, a specialist in occupational medicine, found that appellant had a 12 percent left lower extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition.

In order to determine the degree of appellant's left lower extremity impairment stemming from his accepted lumbar strain and permanent aggravation of spondylolisthesis conditions, OWCP referred him to Dr. F. Gregory Fisher, a specialist in orthopedic surgery, for a second opinion examination. In a December 9, 2009 report, Dr. Fisher found that appellant had a four percent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides*. Relying on Table 16-11 at page 533 of the A.M.A., *Guides*,[2] which rates impairments based on sensory and motor deficits, he found that appellant had a severity level of 2, for impaired light touch but retained sharp/dull recognition. Dr. Fisher applied this finding to Table 16-12, page 534 of the A.M.A., *Guides*,[3] under which he found appellant's mild severity deficit for peripheral nerve/sciatica rated a grade of B, which yielded a four percent left lower extremity impairment due to his permanent aggravation of spondylolisthesis condition.

In a December 28, 2009 report, an OWCP medical adviser concurred with Dr. Fisher's findings and determined that appellant had a four percent impairment of his left lower extremity.

By decision dated December 10, 2010, OWCP granted appellant a schedule award for a four percent permanent impairment of the left lower extremity for the period June 18 to September 6, 2010, for a total of 11.52 weeks of compensation.

By letter dated December 20, 2010, appellant, through his attorney, requested an oral hearing, which was held on April 18, 2011.

In a report dated May 3, 2011, Dr. Fritzhand stated that he had reviewed his previous findings from his October 27, 2009 report and found that appellant had a 14 percent left lower extremity impairment under the sixth edition of the A.M.A., *Guides*. He did not indicate that he had examined appellant again for purposes of evaluating his permanent impairment subsequent to October 27, 2009. Dr. Fritzhand stated:

> "I used *The Guides Newsletter* July/August 2009 to assess impairment. [Appellant] has an L5 nerve root impairment. I used Table 16-11 (page 533) to

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

[3] *Id*. at 534

assess both sensory and motor impairments. He has a severity 3 (severe) sensory deficit and a severity 1 (mild) motor deficit. I used [p]roposed Table 2 L5 nerve root [c]lass 1. Table 16-6 GMFH2 and Table 16-8 GMCS2. Thus, C moves to H. [Appellant] has a [six] percent impairment to the left lower extremity due to a sensory deficit and a [nine] percent impairment to the left lower extremity due to his motor deficit. I then used the Combined Value Chart. Thus, it is my medical opinion that [appellant] has sustained a permanent partial impairment to the left lower extremity of 14 percent."

By decision dated July 6, 2011, an OWCP hearing representative found that, although the medical evidence appellant submitted did not contain sufficient rationale to establish that he was entitled to an additional schedule award, it was sufficient to require further development of the case record. The hearing representative therefore set aside the December 10, 2010 decision and directed OWCP to refer the case record, a statement of accepted facts and a copy of Dr. Fritzhand's May 3, 2011 report to an OWCP medical adviser. She directed the medical adviser to review Dr. Fritzhand's report and determine whether appellant had more than four percent impairment to the left lower extremity pursuant to the sixth edition of the A.M.A., *Guides*.

In a July 13, 2011 report, Dr. Howard P. Hogshead, a specialist in orthopedic surgery and an OWCP medical adviser, found that Dr. Fisher's December 9, 2009 four percent impairment rating for the left lower extremity was appropriate and in accordance with the sixth edition of the A.M.A., *Guides*. He determined that Dr. Fritzhand's May 3, 2011 report was not properly rendered and did not meet the current standards of the sixth edition of A.M.A., *Guides*. Dr. Hogshead stated:

"OWCP now recognizes only tables published by Dr. Chris Brigham in *The Guides Newsletter* July/August 2009. Only extremity impairment resulting from spinal nerve roots deficit, motor and/or sensory are recognized; *i.e.*, a radiculopathy. The intent is to preserve the same relative rating structure. Using Table 2, page 6, a moderate sensory deficit of the L5 root, [g]rade C, appellant had a three percent permanent impairment of the left lower extremity. No motor deficit is recorded."

"[Dr. Fritzhand's May 3, 2011 report] changes the findings to severe sensory loss and a mild motor loss. This is not correct. Continuing the calculation, he alternates between diagnosis-based impairment methodology, Table 16-6 and the tables in *The Guides Newsletter*. This is not correct. Dr. Fritzhand concludes that there is [6] percent impairment due to sensory loss and a [9] percent impairment due to motor loss, which he 'combines' [for a] 14 percent impairment of the left lower extremity. Also incorrect.

"Based on the above errors and misrepresentations, the impairment remains at four percent of the left lower extremity."

By decision dated July 21, 2011, OWCP denied appellant's request for an additional schedule award. It found that the medical adviser's July 13, 2011 report represented the weight of the medical evidence.

By letter dated October 13, 2011, appellant's attorney requested reconsideration. He contended that OWCP either did not read or misinterpreted Dr. Fritzhand's May 3, 2011 report in its July 21, 2011 decision. Counsel further contended that OWCP failed to adhere to the instruction of the hearing representative in her July 6, 2011 decision to further develop the case record.

Appellant submitted an August 8, 2011 report from Dr. Paul R. Mitchell, an osteopath, who stated that appellant was being treated for low back pain and had undergone a program of pain management and medication. Dr. Mitchell diagnosed lumbar degenerative disc disease and lumbar radiculitis but did not provide an impairment evaluation rendered under the protocols of the sixth edition of the A.M.A., *Guides*. Appellant also resubmitted Dr. Fritzhand's May 3, 2011 report.

By decision dated November 3, 2011, OWCP denied appellant's application for review of its schedule award decision on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[4] and its implementing 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. 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.[6] 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.[7]

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.[8] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides*. (6th ed. 2009).

[6] *Id.*

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

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

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.[9]

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.[10]

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.[11] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[12]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained the conditions of lumbar strain and permanent aggravation of spondylolisthesis. Appellant was granted an award on December 10, 2010 for a four percent left lower extremity impairment based on the December 9, 2009 report of Dr. Fisher, OWCP's referral physician. He sought an additional schedule award and submitted the May 3, 2011 report from Dr. Fritzhand, his treating physician, who rated a 14 percent left lower extremity impairment. Dr. Hogshead, OWCP's medical adviser, reviewed this report and found that it did not provide a basis for an additional schedule award. The Board finds that the weight of the medical evidence regarding appellant's left lower extremity impairment rests with the opinion of Dr. Hogshead, who provided an impairment rating in accordance with the protocols and tables of the sixth edition of the A.M.A., *Guides*.

In his July 13, 2011 report, Dr. Hogshead explained that appellant's impairment could be rated as three percent left 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. However, he also noted that Dr. Fisher had rated appellant's impairment as a four percent impairment as a moderate sensory deficit. He noted that, under the previous schedule award, based on Dr. Fisher's December 9, 2009 report, no motor deficit was recorded. Dr. Hogshead concurred with Dr. Fisher conclusion that appellant had a four percent left lower extremity impairment. As noted above, for peripheral nerve impairments to the upper or lower extremities resulting from

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

[10] *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.

[11] *Supra* note 2.

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

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.[13] The Board finds that Dr. Hogshead, OWCP's medical adviser, properly applied the A.M.A., *Guides* to rate appellant's left lower extremity impairment and that his report constitutes the weight of medical opinion.

The Board also finds that the reports from Dr. Fritzhand are of limited probative value. Dr. Fritzhand initially evaluated appellant's permanent impairment status in a report dated October 27, 2009. In the October 27, 2009 report, he stated that appellant had a three percent sensory loss and a nine percent motor deficit. Yet in Dr. Fritzhand's May 3, 2011 report, based upon his October 27, 2009 findings, he concluded that appellant had a severe sensory loss and a mild motor loss. Dr. Hogshead properly pointed out that Dr. Fritzhand's conclusions in his May 3, 2011 report were not proper, given the findings from the October 27, 2009 upon which he relied. He also properly noted that Dr. Fritzhand had improperly combined diagnosis-based impairment methodology at Table 16-6 of the sixth edition of the A.M.A., *Guides* and the tables in *The Guides Newsletter*.

Dr. Fritzhand's May 3, 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 sixth edition of *The Guides Newsletter*. OWCP properly determined that Dr. Fritzhand's report did not provide a basis for an additional schedule award under FECA.[14] The Board will affirm the July 21, 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.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.[15] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[16]

[13] *See G.N.*, *supra* note 10.

[14] The Board notes that a description of appellant's impairment must be obtained from appellant's 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).

[15] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[16] *Howard A. Williams*, 45 ECAB 853 (1994).

ANALYSIS -- ISSUE 2

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by OWCP; and he has not submitted relevant and pertinent evidence not previously considered by OWCP. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[17] The report from Dr. Mitchell did not contain an impairment rating rendered in accordance with the applicable tables and protocols of the A.M.A., *Guides*. Thus this report did not provide any rationalized medical opinion pertinent to the relevant issue; *i.e.*, whether appellant sustained any permanent impairment of his left lower extremity from his accepted lumbar strain and permanent aggravation of spondylolisthesis conditions. The May 3, 2011 report from Dr. Fritzhand was previously submitted and is therefore cumulative and repetitive. Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits in its November 3, 2011 nonmerit decision.

CONCLUSION

The Board finds that appellant is not entitled to a greater schedule award. The Board finds that OWCP properly refused to reopen his case for reconsideration of his claim under 5 U.S.C. § 8128.

[17] *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the November 3 and July 21, 2011 decisions of the Office of Workers' Compensation Programs' are affirmed.

Issued: October 11, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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