

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

_____)	
L.C., Appellant)	
)	
and)	Docket No. 12-941
)	Issued: October 1, 2012
U.S. POSTAL SERVICE, APPALACHIAN)	
PERFORMANCE CLUSTER, Charleston, WV,)	
Employer)	
_____)	

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 20, 2012 appellant filed a timely appeal from the January 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 55 percent permanent impairment of his right leg and 25 percent permanent impairment of his left leg, for which he received schedule awards.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on January 23, 1993 appellant, then a 41-year-old window and distribution clerk, sustained herniated discs at L4-5 and L5-S1 due to lifting a cash drawer. It authorized several lumbar disc surgeries.

In a July 29, 1996 award of compensation, OWCP granted appellant a schedule award for a 55 percent permanent impairment of his right leg. The award was calculated under the standards of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On July 30, 2007 appellant underwent a lumbar laminectomy, decompression and fusion from L2 to S1. On November 29, 2008 he filed a claim for additional schedule award compensation.

Appellant submitted additional evidence, including a July 16, 2009 impairment rating form completed by Dr. Larry Mitchell, an attending Board-certified family practitioner, who stated that appellant had 50 percent impairment of the lower extremity due to loss of function due to sensory deficits, pain or discomfort and 50 percent impairment due to decreased strength.² Dr. Mitchell noted the nerve roots affected were L3, L4, L5, S1, S2 and S3 and indicated the rating was calculated under Table 16-12 and Table 17-8 and Figure 16-3 and Figure 16-4 of the sixth edition of the A.M.A., *Guides* (6th ed. 2009). He stated that appellant fell under class 4 for severe sensory deficits.

In a September 22, 2009 decision, an OWCP hearing representative determined that there was sufficient medical evidence of record to require remanding the case to OWCP for referral of appellant to a second opinion physician for examination and an opinion on the extent of his leg impairment.

On remand, OWCP referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon. In a November 24, 2009 report, Dr. Sheridan indicated that, under Table 16-12 on page 535 of the sixth edition of the A.M.A., *Guides*, appellant's sciatic nerve condition was moderate in nature and fell under class 2 with a default value of 25 percent. He stated that appellant's functional history score was 140 and that the electrodiagnostic studies were normal. Dr. Sheridan indicated that appellant's neurological deficits were for the left leg only as he did not find any deficits for the right leg.³ He indicated that his calculation of the modifiers required movement one space to the left of the default value on Table 16-12 and concluded that appellant had 23 percent permanent impairment of his left leg.

In a supplemental report dated December 3, 2009, Dr. Sheridan stated that, using Table 16-12 for sensory deficit in the first web space on the right, appellant had one percent right lower leg impairment. He stated that, using Table 16-12 for the left leg, appellant was in the moderate

² Dr. Mitchell did not indicate the specific leg or legs for which the impairment ratings were calculated.

³ Dr. Sheridan referenced a November 4, 2008 electrodiagnostic study of the legs. However, the only November 4, 2008 electrodiagnostic study of record pertains to the arms.

motor deficit category for the sciatic nerve (class 2). Dr. Sheridan noted that appellant's functional score was 140, that an adjustment for physical examination was not necessary since the neurological examination findings defined the impairment values in Table 16-12 and that there were no clinical studies involving the lower extremities. He concluded that, after applying these modifiers to the default value, appellant still had 25 percent permanent impairment of his left leg.

In a December 30, 2009 report, an OWCP medical adviser indicated that he concurred with the impairment rating of Dr. Sheridan.

In a January 5, 2011 award of compensation, OWCP granted appellant a schedule award for 25 percent permanent impairment of his left leg.

Appellant requested a review of the written record with an OWCP hearing representative. In a June 15, 2011 letter, appellant's counsel questioned Dr. Sheridan's finding that appellant only had permanent impairment in his left leg.

In a July 25, 2011 decision, an OWCP hearing representative set aside OWCP's January 5, 2011 decision and remanded the case to OWCP for further development. He indicated that Dr. Sheridan referenced a November 4, 2008 electrodiagnostic study of the legs, but noted that it appeared that the only November 4, 2008 electrodiagnostic study of record pertained to the arms. The hearing representative stated that this apparent discrepancy needed to be addressed. He also found that neither Dr. Sheridan nor an OWCP medical adviser properly applied the standards of the sixth edition of the A.M.A., *Guides*. The hearing representative noted that OWCP had determined that the standards for evaluating leg impairment under the sixth edition of the A.M.A., *Guides* were found in Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., *Guides* Chicago, IL), July/August 2009. He stated:

“On remand, [OWCP] should clarify the record with regard to electrodiagnostic studies dated November 4, 2008 for the lower extremities, ensuring that this is made part of the case record.

“[OWCP] should then ask an [OWCP] medical advis[e]r to review the medical record and indicate whether such evidence is sufficient to establish an impairment rating for the lower extremities based on the principles set forth in [*The Guides Newsletter*]. If further evidence or examination is needed, the medical advis[e]r should indicate what is needed to establish an impairment rating which conforms to the [A.M.A., *Guides*]. After this and any further development deemed necessary, [OWCP] should issue a *de novo* decision regarding the claimant's entitlement to an additional schedule award for permanent impairment to the lower extremities sustained as a result of the accepted work injury.”

On September 3, 2011 an OWCP medical adviser indicated that at issue was whether the electrodiagnostic studies done on November 4, 2008 were sufficient to establish an impairment rating. He stated, “This impairment rating was dated November 4, 2008 done by Dr. Meyer Prolar, but was for the upper extremities which of course are not helpful for lower extremity impairment rating.”

In a January 20, 2012 decision, OWCP found that appellant did not meet his burden of proof to establish that he had more than a 55 percent permanent impairment of his right leg and 25 percent permanent impairment of his left leg, for which he received schedule awards. It discussed an OWCP hearing representative's instruction to clarify the matter of the November 4, 2008 electrodiagnostic studies. OWCP asserted that, in his July 25, 2011 decision, the hearing representative "dismissed the [d]istrict [OWCP] decision dated January 5, 2011 due to upper extremity diagnostic results, when the case is accepted for a lower extremity condition not an upper extremity condition." In denying appellant's claim for increased schedule award compensation, OWCP concluded, "The evidence of record was not sufficient to establish your claim for an increase in the amount previously paid on a schedule award for the left lower extremities in a decision dated January 5, 2011 because: The electrodiagnostic studies dated November 4, 2008 ... [were] for the upper extremities and your case is accepted for a lower extremity condition not an upper extremity condition."

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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 effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.⁸ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.⁹

Proceedings under FECA are not adversary in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Id.*

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., *Guides* Chicago, IL), July/August 2009.

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4). *See also G.N.*, Docket No. 10-850 (issued November 12, 2010).

shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁰ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹¹

ANALYSIS

OWCP accepted that on January 23, 1993 appellant sustained herniated discs at L4-5 and L5-S1 due to lifting a cash drawer. In a July 29, 1996 award of compensation, it granted him a schedule award for 55 percent permanent impairment of his right leg. In a January 5, 2011 award of compensation, OWCP granted appellant a schedule award for 25 percent permanent impairment of his left leg. Appellant claimed entitlement to increased schedule award compensation.

In a July 25, 2011 decision, an OWCP hearing representative set aside OWCP's January 5, 2011 decision and remanded the case to OWCP for further development with specific instructions for OWCP to follow. In a January 20, 2012 decision, OWCP found that appellant did not meet his burden of proof to establish that he has more than 55 percent permanent impairment of his right leg and 25 percent permanent impairment of his left leg, for which he received schedule awards.

The Board finds that OWCP, in its January 20, 2012 decision, did not adequately develop the case as instructed by the hearing representative in his July 25, 2011 decision. Although OWCP reviewed the evidence of record and properly noted that the only November 4, 2008 electrodiagnostic studies of record pertained to appellant's arms rather than his legs, it was not appropriate for OWCP to deny appellant's claim for increased schedule award compensation solely on these grounds.

An OWCP hearing representative had properly determined that further development was needed to apply the correct standards of the sixth edition of the A.M.A., *Guides* in order to determine appellant's leg impairment. He had noted that OWCP had determined that the standards for evaluating leg impairment under the sixth edition of the A.M.A., *Guides* were found in Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., *Guides* Chicago, IL), July/August 2009.¹² The hearing representative directed OWCP to have an OWCP medical adviser review the medical record and indicate whether such evidence was sufficient to establish an impairment rating for the lower extremities based on the principles set forth in the July/August 2009 issue of *The Guides Newsletter*. If further evidence or examination was needed, the medical adviser was to indicate what was needed to establish an impairment rating which conformed to the A.M.A., *Guides*. There is no indication that, on remand, OWCP attempted to develop the case in this regard in order to properly apply the standards of the sixth edition of the A.M.A., *Guides*.

¹⁰ *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹¹ *See Robert F. Hart*, 36 ECAB 186 (1984).

¹² *See supra* notes 8 and 9.

The Board finds that the case must be remanded to OWCP for proper application of the A.M.A., *Guides* to determine whether appellant is entitled to additional schedule award compensation for permanent impairment of his legs beyond that already received. After such development it deems necessary, OWCP shall issue an appropriate decision on the extent of the permanent impairment of appellant's legs.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than 55 percent permanent impairment of his right leg and 25 percent permanent impairment of his left leg, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 1, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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