United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 13-1649**
	)	**Issued: December 24, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Santa Ana, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant filed a timely appeal from February 5 and June 4, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP), which denied an additional schedule award. 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 the schedule award claim.

ISSUE

The issue is whether appellant has a ratable impairment of the left leg due to his employment-related condition and greater than one percent impairment of the right leg for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 30, 2008 appellant, then a 59-year-old letter carrier, filed an occupational disease claim alleging a back injury as a result of the repetitive motions at his job. OWCP accepted his claim for multiple lumbosacral disc bulges, L5-S1 nerve root impingement with radiculopathy and lumbosacral spondylolisthesis. Appellant stopped work on July 21, 2008 and returned to light duty on July 31, 2008. He received medical treatment and underwent physical therapy.

On June 18, 2012 appellant requested a schedule award.

In an April 2, 2012 report, Dr. Charles Xeller, a Board-certified orthopedic surgeon, examined appellant for occupational injuries to his low back that was reported on July 13, 2008 and noted that he was on limited duty. Appellant worked as a letter carrier for 29 years and listed his work duties. Dr. Xeller reviewed appellant's medical records and noted that magnetic resonance imaging scan reports in 2008, 2010 and 2012 demonstrated a slight progressive slippage at L5-S1, which was a spondylolisthesis grade 1. He also reported that a July 2008 x-ray of the lumbar spine revealed grade 1 spondylolisthesis and a September 21, 2010 nerve conduction study demonstrated bilateral chronic lumbosacral radiculopathy.

Upon examination of appellant's lumbar spine, Dr. Xeller observed decreased range of motion in flexion, forward flexion to 30 degrees and extension to 20 degrees. He noted right and left lateral bending to 15 degrees with pain over the sacroiliac area. Straight leg raise testing was negative. Dr. Xeller also observed full range of motion of appellant's hips, knees, feet and ankle. He diagnosed lumbar spondylosis, lumbar disc degeneration and lumbar radiculopathy with nerve conduction. Dr. Xeller referenced Table 17-4, page 570 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He stated that appellant had a motion segment problem at a single level, multiple protrusions at other levels and nonverifiable radicular complaints. Dr. Xeller noted that clinical studies were not applicable and determined that appellant was a class 1 with physical examination and functional history of 1. He reported that appellant was a grade C for a seven percent spinal impairment of the whole person.

In an April 2, 2012 functional capacity evaluation report, Dr. Stephen Stepaniuk, a chiropractor, related that appellant worked modified duty at the employing establishment and described his employment duties. He determined that according to the U.S. Department of Occupational Titles appellant had medium lift and a 78.4 percent loss of capacity for the lower portion of the body. Range of motion measurements of the spine demonstrated lumbar flexion to 36 degrees, lumbar extension to 7 degrees, sacral flexion to 25 degrees, left lateral extension to 9 degrees and right lateral extension to 8 degrees.

In an April 2, 2012 electromyogram and nerve conduction velocity report, Dr. Maliheh Massih, Board-certified in physical medicine and rehabilitation, observed borderline values for distal latency of normal amplitude of the bilateral saphenous sensory nerves and normal values for distal latency and velocity of the right tibial motor nerve. He found an abnormal electrodiagnostic study of the lower extremities and diagnosed bilateral L5-S1 chronic radiculopathy and early onset of peripheral neuropathy.

In a June 11, 2012 progress report, Dr. Hosea Brown III, a Board-certified internist, conducted a follow-up examination of appellant's low back. Upon examination of the lumbar spine, he observed mild to moderate discomfort during the range of motion examination and mild to moderate spasm of paraspinal lumbosacral musculature. Flexion was to 65 degrees, extension to 25 degrees, lateral flexion to 25 degrees and lateral rotation to 35 degrees. Dr. Brown reported that appellant's physical examination was significantly improved when compared to a previous evaluation. He diagnosed lumbosacral multiple disc bulges, nerve impingement with radiculopathy of L5-S1 and lumbosacral spondylolisthesis.

OWCP referred appellant's schedule award claim to the district medical adviser. In a July 19, 2012 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and district medical adviser, noted appellant's accepted conditions of lumbosacral disc bulging, spondylolisthesis and radiculopathy. He reviewed the medical history, including the statement of accepted facts. Dr. Harris provided an accurate history of injury and reported a date of maximum medical improvement of April 2, 2012, the date of Dr. Xeller's examination.

Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Harris opined that appellant had one percent impairment of the right leg due to residual problems with mild pain/impaired sensation from his right SI lumbar radiculopathy and no ratable impairment of the left lower extremity. He noted that Dr. Xeller calculated impairment based on Table 17-4, page 570-74, which provided impairment for mechanical low back pain, radiculopathy and spinal pathology. According to OWCP's procedures, schedule awards were not based on loss of use of the spine but through impairment to the lower extremities.

On September 12, 2012 OWCP granted a schedule award for one percent impairment of the right leg and denied any ratable impairment of the left leg based on Dr. Harris' report. The award ran from April 2 to 22, 2012 for 2.88 weeks.

On September 30, 2012 appellant requested a review of the written record. He objected to the schedule award as Dr. Harris had never treated him as a patient or saw him in person. Appellant contended that the award of compensation should have been based on Dr. Xeller's April 2, 2012 rating. He resubmitted various medical reports.

In a decision dated December 21, 2012, OWCP affirmed the September 12, 2012 schedule award decision finding that the weight of the medical evidence rested with the district medical adviser.

On January 14, 2013 appellant requested an oral hearing.

By decision dated February 5, 2013, an OWCP hearing representative denied appellant's request for an oral hearing as he previously received a review of the written record, he was not entitled to a hearing as a matter of right and appellant's case could equally be addressed by requesting reconsideration.

By letter dated March 12, 2013, appellant through counsel, submitted a request for reconsideration of the December 21, 2012 decision.

In a January 14, 2013 report, Dr. Xeller stated that he examined appellant for further evaluation of occupational injuries to his lower back and provided an accurate history of injury. He reported a date of maximum medical improvement as April 2, 2012. Dr. Xeller reviewed appellant's diagnostic studies and noted evidence of a high probability of early onset of peripheral neuropathy which was affecting the sensory fibers of the lower extremity and bilateral L5-S1 chronic lumbosacral radiculopathy. He noted diagnoses of lumbosacral disc bulges, lumbar radiculopathy and lumbar spondylolisthesis. Based on the sixth edition of the A.M.A., *Guides*, page 571, Dr. Xeller opined that appellant had seven percent spinal impairment for spondylolisthesis and nerve root irritation. He explained that he rated appellant for motion segment instability at L5-S1 and noted that electrodiagnostic studies indicated radiculopathy.

In progress reports dated from February 4 to May 1, 2013, Dr. Brown examined appellant for low back pain and noted that he underwent a schedule award evaluation in April 2012. Upon examination of appellant's lumbar spine, he observed significant discomfort upon performance of range of motion testing and significant spasm of the paraspinal lumbosacral musculature. Flexion was to 60 degrees, extension to 20 degrees, lateral flexion to 20 degrees and lateral rotation to 30 degrees. Dr. Brown noted appellant's accepted conditions for lumbosacral multiple disc bulges, L5-S1 nerve impingement with radiculopathy and lumbosacral spondylolisthesis.

In a decision dated June 4, 2013, OWCP denied modification of the December 21, 2012 schedule and decision finding that the new medical evidence failed to establish greater impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing regulations[3] 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as the appropriate standard for evaluating schedule losses.[4] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

A schedule award is not payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[6] Neither FECA nor the regulations provide

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[6] *W.C.*, 59 ECAB 372 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[7] However, a schedule award is permissible where the employment-related spinal condition affects the upper or lower extremities.[8]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.[9] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.[10] FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[11]

A claim for an increased schedule award may be based on new exposure.[12] Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[13]

ANALYSIS

OWCP accepted appellant's claim for lumbosacral multiple disc bulges, L5-S1 nerve root impingement with radiculopathy and lumbosacral spondylolisthesis. Appellant stopped work on July 21, 2008 and returned to light duty on July 31, 2008.

On June 18, 2012 appellant filed a claim for a schedule award. He submitted the April 2, 2012 and January 14, 2013 reports from Dr. Xeller, who reviewed appellant's history of treatment and conducted an examination. Dr. Xeller referenced Table 17-4, page 570 of the sixth edition of the A.M.A., *Guides* that pertain to the lumber spine. He opined that appellant had seven percent whole person impairment. OWCP referred the medical record to Dr. Harris, the district medical adviser. In a July 19, 2012 report, Dr. Harris provided an accurate history of injury and medical treatment. He noted a date of maximum medical improvement of April 2, 2012, the date of Dr. Xeller's examination. Citing generally to the sixth edition of the A.M.A., *Guides*, Dr. Harris found that appellant had one percent right leg impairment due to residual problems with mild pain and impaired sensation from the right SI lumbar radiculopathy. He also made no impairment to the left leg. OWCP granted appellant a schedule award for one percent impairment of the right leg and found no ratable impairment of the left lower extremity.

[7] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

[9] Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 3.700, Exhibit 4.

[10] *Id.*

[11] *Id.*

[12] *A.A.*, 59 ECAB 726 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Rose V. Ford*, 55 ECAB 449 (2004).

[13] *James R. Hentz*, 56 ECAB 573 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

Neither FECA nor implementing federal regulations provide for a schedule award based on impairment to the back or spine. A schedule award is permissible, however, where the employment-related spinal condition affects the upper or lower extremities. The rating of Dr. Xeller is not probative as he rated impairment to the lumbar spine and not the lower extremities. The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment to the legs.[15] The Board also notes that Dr. Harris did not reference any specific tables of the A.M.A., *Guides* to support his rating of appellant's legs. Dr. Harris also did not review the additional medical evidence received from appellant's treating physician with appellant's March 12, 2013 request for reconsideration.[16] OWCP's procedures provide that *The Guides Newsletter* July/August 2009 is the appropriate method for determining lower extremity impairment in this case.[17] Accordingly, the Board finds that the case should be remanded for further development of the medical evidence. OWCP should request a medical opinion properly applying the sixth edition of the A.M.A., *Guides*, including the 2009 newsletter. Thereafter, it shall issue an appropriate final decision on appellant's permanent impairment.

CONCLUSION

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

[14] *Horace L. Fuller*, 53 ECAB 775 (2002).

[15] Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 3.700, Exhibit 4.

[16] *See generally* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.808.6e.f (February 2013).

[17] *Id. See also R.F.*, Docket No. 12-527 (issued July 16, 2012).

ORDER

IT IS HEREBY ORDERED THAT the June 4 and February 5, 2013 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further action consistent with this decision of the Board.

Issued: December 24, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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