United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 13-479**
	)	**Issued: June 6, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer	)	

Appearances:
Steve Burt, 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 January 3, 2013 appellant, through his representative, filed a timely appeal from the December 12, 2012 Office of Workers' Compensation Programs' (OWCP) schedule award decision. 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 schedule award determination.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a three percent permanent impairment of his right lower extremity, for which he received a schedule award or if he has a ratable permanent impairment of his left lower extremity.

FACTUAL HISTORY

On June 20, 2001 appellant, then a 43-year-old letter carrier, lost his balance while exiting his work vehicle and injured his lower back. He did not stop work. On October 3, 2001

[1] 5 U.S.C. § 8101 *et seq.*

OWCP accepted the claim for back strain. It expanded the claim to include L5-S1 right radiculopathy on November 19, 2002. Appellant received appropriate compensation and benefits.

A March 18, 2004 electromyography (EMG) scan read by Dr. M. David Jackson, a Board-certified internist and treating physician, revealed evidence consistent with S1 radiculopathy and no EMG evidence of myopathy.

On November 17, 2009 appellant filed a claim for a schedule award. In a February 25, 2010 report, Dr. Jackson noted utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008) (A.M.A., *Guides*) and referred to Table 16-10.[2] He explained that appellant had electrodiagnostic testing which revealed active and chronic denervation which confirmed S1 radiculopathy. Dr. Jackson noted that appellant had multiple disc protrusions with foraminal stenosis and flares of sciatica. He indicated that the hip and knee impairment were at a class 2 with grade modifier adjustments being the same for the hip and knee with one for functional history and examination and, two for clinical studies and one for American Association of Orthopedic Surgeons (AAOS) score. Dr. Jackson explained that the A through E grade modifiers for both levels was a C. He advised that he utilized the peripheral nerve impairment for the sciatic nerve giving the sensory a grade 1 and class 1, the motor a grade 2 and a grade C for both. Dr. Jackson opined that appellant reached maximum medical improvement and that appellant had 15 percent impairment of the right leg. He translated the final impairment to the peripheral nerve to six percent whole body impairment.

In an October 14, 2010 report, OWCP's medical adviser determined that appellant had a 16 percent impairment of the right lower extremity.

On January 31, 2011 OWCP referred appellant for a second opinion to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, to determine the extent of appellant's work-related residuals and whether appellant had permanent impairment.

In a February 18, 2011 report, Dr. Obianwu noted appellant's history of injury and treatment and examined appellant. He determined that electrodiagnostic studies were needed before he could make an impairment determination. A March 18, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Gregory M. White, a Board-certified diagnostic radiologist, revealed no lumbar compression fracture, subluxation, suspicious narrow lesion or paraspinal mass. His findings included that the distal cord and conus were unremarkable. Dr. White diagnosed multilevel degenerative spondylosis, greatest at L4-5 and L5-S1.

In a May 13, 2011 report, Dr. Obianwu explained that there was no clinical evidence of impairment of the L5. He explained that his impairment rating was based on the S1 nerve root. Dr. Obianwu noted there was no motor involvement and advised that appellant had moderate sensory deficit based upon Table 15-4 of the A.M.A., *Guides*. He advised that the default value for moderate sensory deficit was two percent leg impairment. Dr. Obianwu explained that appellant had a grade modifier two for both functional history and clinical studies. He indicated

[2] A.M.A., *Guides* 530.

that the grade modifier for physical examination was excluded since the neurological examination findings defined the impairment values. Dr. Obianwu opined that the final net adjustment was plus two and the final impairment was three percent to right lower extremity. He indicated that appellant reached maximum medical improvement.

In a report dated May 26, 2011, OWCP's medical adviser utilized the A.M.A., *Guides* and determined that appellant reached maximum medical improvement on February 18, 2011, the date of Dr. Obianwu's evaluation. He explained that regarding the spine, he noted that the approach to the evaluation of spinal nerve impairment (such as radiculopathy affecting the extremities) was consistent with the A.M.A., *Guides* and was discussed in the July/August issue of *The Guides Newsletter*.[3] The medical adviser explained that regarding the left lower extremity there was no impairment as there were no objective findings. For the right lower extremity, he noted that Dr. Obianwu referred to Table 15-4. The medical adviser explained that this was a typographical error as this section of the A.M.A., *Guides* referred to an elbow evaluation. He explained that radiculopathy was most appropriately rated using *The Guides Newsletter*. Regarding the right leg, the medical adviser noted that Dr. Obianwu documented a moderate S1 sensory deficit and no motor deficit. He advised that this could be rated according to proposed Table 2 and that a default two percent impairment applied to the sensory deficit. The medical adviser advised that a grade modifier two applied for functional history pursuant to Table 15-7 and for clinical studies Table 15-9. He applied the net adjustment formula and determined that appellant had three percent right lower extremity impairment.

Accordingly, on June 8, 2011, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity. The award covered a period of 8.64 weeks from February 18 to April 19, 2011.

On June 14, 2011 appellant requested a hearing, which was held on September 26, 2011. A July 11, 2001 EMG read by Dr. Aaron Sable, a Board-certified internist, revealed no electrodiagnostic evidence of acute left lumbosacral motor radiculopathy and a possible left-sided disc lesion.

In a letter dated September 26, 2011, counsel provided additional evidence. He also noted that OWCP's medical adviser provided an earlier report on October 14, 2010 that found 16 percent impairment. Counsel questioned such wide discrepancies on appellant's entitlement to a schedule award. In an August 5, 2011 report, Dr. Jackson disagreed that there were no objective findings in the left leg. He advised that appellant had a diminished left Achilles reflex and at least two electrodiagnostic studies demonstrating active denervation in an S1 distribution on the left. Dr. Jackson noted that Dr. Obianwu did not have a copy of the electrodiagnostic testing. He opined that the denervations were indicative of a chronic condition.

In a December 15, 2011 decision, OWCP's hearing representative set aside the June 8, 2011 OWCP decision and remanded the case for additional development. The hearing representative directed OWCP to provide Dr. Obianwu with a copy of all medical evidence of record to include the new medical evidence that was provided since the hearing and a copy of the

[3] Rating Spinal Nerve Extremity Impairment using the sixth edition, *The Guides Newsletter* (A.M.A., Chicago, IL), July/August 2009.

statement of accepted facts. The hearing representative indicated that Dr. Jackson should be asked to provide a reasoned opinion as to whether his report of August 5, 2011 and the electrodiagnostic studies of 2002 and 2004 demonstrated that appellant had a permanent impairment of the left leg. OWCP was thereafter directed to refer the matter to the medical adviser for a reasoned opinion on impairment to include an explanation for the discrepancies in the October 14, 2010 report and the May 26, 2011 report.

On January 20, 2012 OWCP requested an addendum from Dr. Obianwu. In a January 30, 2012 report, Dr. Obianwu explained that Dr. Jackson discussed two electrodiagnostic studies. He explained that the first one was completed on July 2001 by Dr. Sable and was negative. Dr. Obianwu advised that the March 18, 2004 study was consistent with ongoing S1 radiculopathy on the left. He explained that he had considered this in his May 13, 2011 report and referred to Table 15-4 of the A.M.A., *Guides*.[4] Dr. Obianwu indicated that he determined that appellant had a moderate sensory deficit of two percent. He explained that when the grade modifiers were considered, the final net adjustment resulted in a three percent impairment of the left lower extremity predicated on the S1 radiculopathy. Dr. Obianwu noted that the section on impairment was finalized with conclusion of S1 radiculopathy on the left lower extremity providing for three percent impairment of the left lower extremity. He opined that appellant reached maximum medical improvement sometime in 2004 when he stopped delivering mail. Dr. Obianwu included handwritten notations on a page of Table 2 of *The Guides Newsletter* with his calculations. In these, he indicated that impairment of the right upper extremity and stated that this was based on moderate sensory deficit, no motor involvement and overall clinical presentation.

In a March 6, 2012 report, OWCP's medical adviser concurred with Dr. Obianwu regarding three percent right leg impairment. He noted that he had also reviewed the January 30, 2012 report from Dr. Obianwu and explained that the notation for a left lower extremity appeared to be an error as his handwritten notes indicated the right lower extremity. Regarding the difference in reports, the medical adviser explained that the difference was the result of several factors. He noted that he reviewed the impairment ratings from other providers and interpreted their findings as he had not personally examined the claimant. The medical adviser noted that in his earlier impairment rating, he included impairment for motor weakness, which was documented in some of Dr. Jackson's reports, but that motor weakness was not documented by Dr. Obianwu and was not considered in his later rating. He explained that the A.M.A., *Guides* did not provide a direct method for evaluating extremity impairments based on sciatic nerve impairments but that *The Guides Newsletter* offered an approach to rating spinal nerve impairments consistent with sixth edition methodology. The medical adviser noted that Dr. Obianwu originally chose a method to evaluate appellant utilizing sciatic nerve impairment and that he subsequently utilized the A.M.A., *Guides*. He explained that these two different methods may return slightly different results. The medical adviser stated that his May 26, 2011 report had a typographical error in that it contained a line near the top that noted three percent left leg impairment. However, he indicated that the body of the report detailed three percent right leg impairment. The medical adviser advised that, based upon Dr. Obianwu's February 18, 2011 examination, there was no objective weakness or diminished sensation of the left leg,

[4] A.M.A., *Guides* 399.

warranting zero impairment based upon *The Guides Newsletter*. He opined that maximum medical improvement was reached on February 18, 2011.

By decision dated June 12, 2012, OWCP denied appellant's claim for an increased schedule award.

On June 18, 2012 appellant requested a telephone hearing, which was held on October 2, 2012. In an August 22, 2012 report, Dr. Jackson advised that appellant returned for chronic left S1 radiculitis. He indicated that appellant had diminished left S1 reflex and at least two EMG's which revealed active denervation in S1 on the left. Dr. Jackson opined that appellant had chronic S1 radiculitis on the left.

In a December 12, 2012 decision, OWCP's hearing representative affirmed the June 12, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations[6] 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.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

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 A.M.A., *Guides* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.[10] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[11]

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

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

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

ANALYSIS

The Board finds that this case is not in posture for decision. 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.[12]

In this case, OWCP accepted appellant's traumatic injury claim for back strain, L5-S1 right radiculopathy and granted a schedule award for three percent permanent impairment of the right leg. Thereafter, appellant filed a claim for a schedule award and furnished a February 25, 2010 report from Dr. Jackson citing various tables in the A.M.A., *Guides* and calculating an impairment rating of 15 percent for the right leg. As noted, while FECA does not authorize schedule awards for loss of use of the spine, a claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*. In this case, Dr. Jackson failed to utilize the proper standard. Therefore, his opinion on the extent of appellant's permanent impairment is of limited probative value.[13]

On the other hand, the Board finds that the March 6, 2012 report of OWCP's medical adviser is insufficient. While the medical adviser indicated that he concurred with the report of the second opinion physician, Dr. Obianwu, regarding the three percent impairment to the right lower extremity, it is not clear how he or Dr. Obianwu arrived at this calculation. The Board notes that, while the medical adviser explained that *The Guides Newsletter* was the appropriate standard for evaluating spinal impairments, the Board notes that Dr. Obianwu referred to Table 15-4 to base his opinion, which is the elbow regional grid for upper extremity impairments.[14] Although Dr. Obianwu also included handwritten notations on a copied page of Table 2 from *The Guides Newsletter,* his handwritten notations on this page did not clearly explain how he applied the table or grade modifiers, in his calculations. He also indicated that impairment was to the right upper extremity. Neither the medical adviser nor Dr. Obianwu sufficiently explained how they arrived at a three percent right lower extremity impairment utilizing *The Guides Newsletter*.

The Board finds that the case is not in posture for decision as none of the physicians properly explained how they arrived at their impairment ratings. As noted above, for nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the examiner should apply the July to August 2009 *Guides Newsletter*.[15] The Board will thus remand the case for proper application of the A.M.A., *Guides* regarding the extent of appellant's permanent impairment of the right lower extremity. After such development it deems

[12] *Horace L. Fuller,* 53 ECAB 775, 777 (2002).

[13] *James Kennedy, Jr*., 40 ECAB 620, 627 (1989).

[14] A.M.A., *Guides* 399.

[15] *See supra* note 14.

necessary, OWCP shall issue an appropriate decision on the extent of the permanent impairment of his legs.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: June 6, 2013
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