United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant **and** **DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND STATIONS, Colts Neck, NJ, Employer**	)	**Docket No. 12-773** **Issued: March 29, 2013**

Appearances:
Thomas R. Uliase, 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 February 23, 2012 appellant, through his attorney, filed a timely appeal of a November 23, 2011 merit decision 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has more than eight percent impairment of his right lower extremity for which he has received a schedule award.

On appeal, counsel argued that there was an unresolved conflict of medical opinion evidence between OWCP's medical adviser and appellant's physician, Dr. David Weiss, an osteopath.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. Appellant filed a traumatic injury claim alleging that on October 21, 1999 he experienced a sharp pain in his lower back while driving in the performance of duty. His x-rays of October 27, 1999 demonstrated an apparent spondylolisthesis at L5-S1. OWCP accepted appellant's claim for aggravation of preexisting spondylolisthesis and preexisting spondylosis on November 8, 1999. Appellant underwent a magnetic resonance imaging (MRI) scan on November 17, 1999 which demonstrated a minimal disc bulge at T12-L1 with no evidence of a herniated disc or spinal stenosis. Electrodiagnostic studies on December 20, 1999 of the right lower extremity including nerve conduction studies and an electromyogram (EMG) were normal. OWCP authorized an anterior lumbar interbody fusion and posterior lumbar fusion with reduction of spondylolisthesis on February 2, 2000. On April 17, 2000 appellant underwent an anterior lumbar discectomy at L5-S1, anterior lumbar interbody fusion and body bone cage fixation due to lumbar spondylolisthesis at L5-S1, lumbar spinal stenosis, spondylosis L5-S1 and degenerative disc disease L5-S1. An MRI scan on March 24, 2003 demonstrated a herniated disc at L3-4 on the left and L4-5 on the right. Appellant had some scar tissue posterior to the L5-S1 fusion, but no significant spinal stenosis.

Appellant requested a schedule award on September 15, 2004. In support, he submitted a report dated May 24, 2004 from Dr. Weiss applying the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] and determining that appellant had 37 percent impairment of the right lower extremity. OWCP's medical adviser reviewed the record and found 32 percent impairment of the right lower extremity. Due to the disagreement between these physicians, OWCP found a conflict and referred appellant to Dr. Ian Fries, a Board-certified orthopedic surgeon, who determined that appellant had 11 percent impairment. Due to a mathematical error in Dr. Fries' calculations, a new OWCP medical adviser reduced the impairment rating to eight percent. On August 2, 2007 appellant underwent electrodiagnostic studies which were read as normal with no evidence of a lumbosacral motor radiculopathy on either side. By decision dated July 10, 2008, OWCP granted appellant a schedule award for eight percent impairment of the right lower extremity. Appellant underwent an MRI scan on August 12, 2008 which demonstrated the posterior transpedicular spinal fusion at L5-S1 with no gross disc extrusion or evidence of central spinal stenosis. The MRI scan demonstrated multilevel degenerative changes and facet joint arthropathy. OWCP's hearing representative affirmed this decision on February 24, 2009. Appellant appealed to the Board and in its decision and order dated March 16, 2010,[3] the Board found that at the time of Dr. Fries report there was no conflict of medical opinion evidence. The Board remanded the case for additional development of the medical evidence from Dr. Weiss and the original medical adviser. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

[2] A.M.A., *Guides* (5th ed. 2001).

[3] Docket No. 09-1561 (issued March 16, 2010).

Following the Board's decision, OWCP requested additional medical evidence from Dr. Weiss on April 30, 2010 based on the sixth edition of the A.M.A., *Guides*.[4] On June 25, 2010 Dr. Weiss updated a report dated September 27, 2006. He did not reexamine appellant. Dr. Weiss repeated his findings of intermittent low back pain and stiffness with numbness and tingling in the right lower extremity down to the calf. He repeated appellant reported radicular pain. On physical examination, Dr. Weiss described a persistent right lower extremity list. He also found that that sitting root sign was positive on the right at 35 degrees above the horizontal producing radicular pain down the right lower extremity and on the left at 45 degrees producing complaints of pain into the left gluteal region. On the right, straight leg raising was also positive producing radicular pain down the right lower extremity. Dr. Weiss found some loss of strength on manual muscle testing in the hip flexors and gastrocnemius. He reported a perceived sensory deficit over L4, L5 and S1 dermatomes involving the right lower extremity. Dr. Weiss found that appellant's circumferential gastrocnemius was one centimeter less on the right than left. He applied the sixth edition of the A.M.A., *Guides* and found that appellant had a class 1 sensory deficit of the right L4 nerve foot, one percent impairment. Dr. Weiss found a class 2 Functional History (GMFH) as appellant could not perform gainful employment and a class 2 Clinical Studies (GMCS) factor based on appellant's MRI scan. After applying the appropriate formula, he determined that appellant had two percent impairment of the right lower extremity. Dr. Weiss also determined that appellant had four percent impairment due to class 1 sensory deficits of the right L5 and S1 nerve roots with similar functional history and clinical studies grades resulting in nine percent impairment. He found a class 1 IV/V motor strength deficit of the right gastrocnemius or 9 percent impairment with a net adjustment of 2 resulting in 13 percent impairment. Dr. Weiss also found a class 2 III/IV motor strength deficit of the right hip flexors or 14 percent impairment. He concluded that appellant's combined right lower extremity impairment was 33 percent.

OWCP referred Dr. Weiss' updated calculations to OWCP's medical adviser on July 21, 2010. Dr. Henry J. Magliato, a Board-certified orthopedic surgeon, reviewed Dr. Weiss' ratings and stated that based on the August 12, 2008 MRI scan there was no evidence of disc extrusion, spinal stenosis or dural or nerve root compression. He found that the 33 percent right lower extremity radiculopathy was not supported by the MRI scan which was performed after Dr. Weiss' original findings.

OWCP referred appellant for a second opinion evaluation with Dr. Aldo Iulo, a Board-certified orthopedic surgeon, on August 25, 2010. In a report dated August 25, 2010, Dr. Iulo found that appellant had no obvious atrophy of the muscles of the lower extremities with symmetrical reflexes. He found normal muscle strength. Appellant stated that he had decreased sensation to touch and pinprick in a stocking distribution. Dr. Iulo diagnosed lumbar spondylolisthesis and lumbar degenerative spondylosis with right sciatica and a one level spine fusion at L5-S1. He found hypesthesia in the L5 and S1 distribution with a nonanatomical functional component. Dr. Iulo applied the sixth edition of the A.M.A., *Guides* and found that appellant had sciatica with mild problems based on the sensory deficit with subjective sciatic pain, class 1 for mild sensory deficit and grade B with a residual permanency of three percent of

[4] A.M.A., *Guides* (6th ed. 2009).

the right lower extremity.[5] He found that appellant had reached maximum medical improvement. Dr. Iulo found that appellant had a grade 1 impairment of the sciatic nerve, class 1 with functional history adjustment of 1, clinical studies adjustment of 1 and grade B resulting in a lower extremity rating of three percent.

Dr. Magliato reviewed this report on October 12, 2010 and found that a mild sensory deficit in the right L5-S1 distribution with a nonantomical functional component. He found a four percent lower extremity impairment due to the lack of grade modifiers rather than three percent. Dr. Magliato opined that appellant had four percent impairment of the right lower extremity and reached maximum medical improvement on September 12, 2002.

By decision dated October 29, 2010, OWCP denied appellant's claim for an additional schedule award on the grounds that the medical evidence did not establish more than eight percent impairment of his right lower extremity for which he had received a schedule award. Counsel requested a hearing. He changed this request to a review of the written record on December 6, 2010.

By decision dated March 8, 2011, the Branch of Hearings and Review vacated the October 29, 2010 decision and remanded for Dr. Iulo to provide the calculations with grade modifiers in accordance with the A.M.A., *Guides*.

In a report dated May 13, 2011, Dr. Iulo stated that the peripheral nerve impairment was to the sciatic nerve, grade 1, class 1. He stated that the functional history adjustment was 1 and that the clinical studies adjustment was 0. Dr. Iulo concluded that the grade was B with the final impairment of three percent of the right lower extremity. Dr. Magliato reviewed this report on May 23, 2011 and noted that Dr. Iulo found appellant had a class 1, grade 1 peripheral nerve impairment of the sciatic nerve or grade C impairment of four percent.[6] Dr. Iulo then used functional history modifier of 1 and clinical studies modifier of 0 and did not use the Physical Examination (GMPE) modifier as this was used to determine the appropriate nerve. Applying the formula under the A.M.A., *Guides*, appellant had a net adjustment of negative one or three percent impairment of the right lower extremity.

By decision dated June 13, 2011, OWCP denied appellant's claim for an additional schedule award.

Counsel requested a before an OWCP hearing representative. He alleged a conflict between Dr. Weiss and Dr. Iulo. In a report dated October 10, 2011, Dr. Weiss reviewed the medical evidence in the file and disagreed with Dr. Iulo's application of the grade modifiers. He stated that he believed his updated impairment rating of June 25, 2010 was appropriate noting that Dr. Iulo did not use Semmes Weinstein Monofilament testing.

By decision dated November 23, 2011, OWCP's hearing representative found that Dr. Iulo's report was entitled to the weight of the medical evidence and established that appellant

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

[6] *Id.* at 535, Table 16-12.

had no more than eight percent impairment of his right lower extremity for which he had received a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[9]

The peripheral nerve rating process of the A.M.A., *Guides* requires that the physician identify the specific nerve, grade the sensory and motor deficit using Table 16-11 and use Table 16-12 to define the impairment. The examiner is then to adjust the impairment using the functional history and clinical studies only.[10]

ANALYSIS

The Board finds that the weight of the medical evidence establishes that appellant has no more than eight percent impairment of his right lower extremity for which he has received a schedule award. The Board originally remanded this case for Dr. Weiss to provide an update of his medical report based on the sixth edition of the A.M.A., *Guides*. Dr. Weiss did so on June 25, 2011 finding that appellant had 33 percent impairment of his right lower extremity due to sensory and motor deficits of peripheral nerves. Following his most recent examination of appellant on September 27, 2006, appellant underwent an MRI scan on August 12, 2008 which demonstrated the posterior transpedicular spinal fusion at L5-S1 with no gross disc extrusion or evidence of central spinal stenosis. The MRI scan demonstrated multilevel degenerative changes and facet joint arthropathy. Dr. Magliato opined that this MRI scan demonstrated no evidence of disc extrusion, spinal stenosis or dural or nerve root compression. He found that the 33 percent right lower extremity radiculopathy was not supported by the MRI scan.

As Dr. Weiss had not reviewed the most recent diagnostic studies in formulating his updated impairment rating, OWCP properly referred appellant to a second opinion physician to

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[7] 5 U.S.C. §§ 8101-8193, 8107.

[8] 20 C.F.R. § 10.404.

[9] For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700, Exhibit 1 (January 2010).

[10] A.M.A., *Guides*, 533, *Peripheral Nerve Rating Process*.

determine his impairment based on examination and all the diagnostic studies. Dr. Iulo examined appellant on August 25, 2010 and found normal muscle strength. However, appellant demonstrated hypesthesia in the L5 and S1 distribution with a nonanatomical functional component. Dr. Iulo applied the sixth edition of the A.M.A., *Guides*, identifying the sciatic nerve in Table 16-12[11] and classifying the severity of the impairment as mild in accordance with Table 16-11.[12] He properly found that a mild impairment correlated to a class 1 grade C or four percent impairment of the sciatic nerve.[13] Dr. Iulo found that appellant had a functional history adjustment of 1 due to a mild problem with gait,[14] clinical studies adjustment of 0 due to the normal electrodiagnostic studies on December 20, 1999 and August 2, 2007. He applied the net adjustment formula, which is grade modifier for functional history minus class of diagnosis plus grade modifier for clinical studies minus class of diagnosis to reach (1-1) + (0-1) or -1, reducing the severity grade to B resulting in a lower extremity rating of three percent.[15]

Following Dr. Iulo's reports, Dr. Weiss disagreed with his conclusions and opined that his own rating of 33 percent was correct. The Board finds that this report while expressing disagreement is not based on a new physical examination. It is based on a physical examination from May 24, 2004. Dr. Weiss' May 24, 2004 physical examination findings constitute stale medical evidence and cannot create a conflict with Dr. Iulo's examination which is more recent by four years.[16] The Board finds that there is no unresolved conflict and that appellant has no more than eight percent impairment of his right lower extremity for which he has received a schedule award.

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.

CONCLUSION

The Board finds that appellant has no more than eight percent impairment of his right lower extremity for which he received a schedule award.

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[11] *Id*. at 535 Table 16-12.

[12] *Id*. at 533, Table 16-11.

[13] *Supra* note 11.

[14] *Id*. at 516, Table 16-6.

[15] *Id.* at 521 (GMFH -- CDX) + (GMCS -- CDX). The A.M.A., *Guides* provide that physical examination adjustment is not reconsidered in rating peripheral nerves. A.M.A., *Guides* 533.

[16] *See H.C.*, Docket No. 11-1407 (issued May 11, 2012) (Finding that Dr. Weiss did not reexamine appellant and based his physical findings on a 2004 examination such that his report constituted stale medical evidence and did not create a conflict of medical opinion evidence).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 29, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Concurring Opinion: Judge Haynes

I concur with the holding in this appeal.

This separate opinion concerns the difficulties created by medical reports such as the one by Dr.Weiss, presented by appellant, in this appeal. The report in question is dated September 27, 2006 and June 25, 2010. There is no advantage for appellant or the finder of fact in this confused presentation of relevant fact and opinion evidence. The values of clarity, simplicity and efficiency are always better served if a medical report is dated to reflect the time it was complete and contains clear references to other evidence as needed.

Appellant could have presented OWCP and the Board with an addendum or a supplemental report to augment the earlier findings of Dr. Weiss. In its current form, the report must confuse and delay the careful reader who must parse the text by date. The hurried or inattentive reader may be entirely misinformed.[17] Evidence presented in this format is less clear and all parties suffer for that reason.

Recent Board precedent shows that this OWCP has found "date-blended" or "composite" reports to be unpersuasive.[18] It is difficult to imagine circumstances where a report offering

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[17] On page four of his seven-page report, Dr. Weiss notes that, for background, he reviewed only his own report dated May 24, 2004. As the majority opinion notes, there is other relevant diagnostic evidence in the file which was apparently not part of the consideration he gave to appellant's permanent impairment rating in 2010.

[18] *P.S.* Docket No. 12-649 (issued February 14, 2013); *J.C.* Docket No. 11-241 (issued September 22, 2011).

opinions reached in 2010, based on a physical examination in 2006, referring to a background report created in 2004, could hold serious probative value. Clearly identified, separate reports, with appropriate references are always preferable.

A new opinion which relies on significantly older evidence does not revive stale evidence with a collection of recent and less recent dates.

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