United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 12-1182**
	)	**Issued: March 15, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2012 appellant filed a timely appeal from an April 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a 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 this case.[2]

ISSUE

The issue is whether appellant sustained greater than an additional 14 percent permanent impairment of the bilateral lower extremities, for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the April 10, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 54-year-old letter carrier, sustained a herniated disc at L4-5 and L5-S1 due to factors of his federal employment. It authorized a back brace and steroid injections.

A magnetic resonance imaging (MRI) scan dated April 15, 2009 revealed disc herniation at L4-5 and a herniated disc at L5-S1.

In a May 4, 2009 report, Dr. Suneela Harsoor, a Board-certified anesthesiologist and pain medicine physician, indicated that appellant had back pain radiating down the left lower extremity as a result of carrying weights and walking at work. She diagnosed left lumbar radiculopathy, myofascial pain and lumbar discogenic pain.

Appellant submitted reports dated April 13, 2009 through August 9, 2010 by Dr. John Kelsey, a Board-certified internist, who released appellant to light-duty work on June 1, 2009 with the following restrictions: cart only, four blocks for one month, no carrying on the back and no steps. On November 10, 2010 Dr. Kelsey reports that appellant retired on August 31, 2010.

On December 12, 2010 appellant filed a claim for a schedule award.

By letter dated February 18, 2011, OWCP requested additional information from appellant's physician to continue processing his schedule award claim.

In a March 9, 2011 report, an OWCP medical adviser reviewed the medical evidence of record and opined that, under Table 16-12 of the sixth edition of the A.M.A., *Guides*, appellant's radiculopathy with sensory deficit corresponded to a grade C default of four percent permanent impairment of the left lower extremity.

On March 29, 2011 appellant filed a second schedule award claim.

In a March 28, 2011 report, Dr. Jacob Salomon, a general surgeon, found that appellant had reached maximum medical improvement as of the date he retired on August 31, 2010. Under Table 16-12 of the A.M.A., *Guides*, he found that appellant had a 16 percent permanent impairment of the right lower extremity and a 9 percent permanent impairment of the left lower extremity. Dr. Salomon indicated that, for the right-sided radiculopathy, the criteria were spinal stenosis and multilevel lumbar disc disease with facet hypertrophy and spondylosis and noted that abnormal electromyogram (EMG) findings would be used as clinical criteria. Upon physical examination, he found paraspinal muscle spasm and positive leg raising signs. Functionally, appellant had decreased activities of daily living which interfered with his normal lifestyle, including difficulty lifting heavy objects and difficulty bathing. He had pain going grocery shopping, working around the house and upon grooming himself, as well as chronic back pain when he stood for a long period of time. Therefore, Dr. Salomon concluded that appellant would be classified as class 2 moderate symptoms. He assigned grade modifier 2 for Functional History (GMFH), grade modifier 1 for Physical Examination (GMPE) and grade modifier 3 for Clinical Studies (GMCS). Dr. Salomon concluded that appellant fell under grade C, equaling a 16 percent permanent impairment of the right lower extremity due to his right lumbar radiculopathy. Regarding the left lumbar radiculopathy, he assigned grade modifier 1 to a

functional history, which was based on appellant's left-sided low back pain upon bending and lifting heavy objects, grade modifier 1 for physical examination and grade modifier 3 for clinical studies, due to abnormal MRI scan and EMG studies. Dr. Salomon concluded that appellant fell under grade E, equaling a nine percent permanent impairment of the left lower extremity.

By decision dated April 6, 2011, OWCP granted appellant a schedule award for four percent permanent impairment for loss of use of the left lower extremity, relying on OWCP's medical adviser's March 9, 2011 report.

On June 23, 2011 a second OWCP medical adviser, reviewed the medical evidence of record and concurred with Dr. Salomon's determination that appellant had a nine percent permanent impairment of the left lower extremity, under Table 16-12 of the A.M.A., *Guides*. The medical adviser explained that appellant's left lower extremity radicular symptoms corresponded to a mild problem rating and grade E adjustment due to examination and EMG findings which led to a nine percent permanent impairment rating.

Subsequently, on October 9, 2011 a third OWCP medical adviser reviewed the medical evidence of record and found that appellant had bilateral leg pain that corresponded to sciatic nerve impairment and had EMGs that showed evidence of radiculopathy. He explained that utilizing Table 16-12, page 535, of the A.M.A., *Guides* a sciatic nerve impairment with moderate sensory deficit was a class 1 diagnosis with a default grade C rating of four percent permanent impairment.[3] OWCP's medical adviser further explained that utilizing the net adjustment formula on page 521, appellant received a grade modifier 2 for functional status, a 2 for physical examination and a 2 for clinical studies. He concluded that this resulted in a net grade modifier of 3 and moved appellant to a grade E which was equal to a nine percent permanent impairment for each lower extremity. The medical adviser opined that this impairment should be the total impairment for each extremity because the previously awarded four percent permanent impairment was for the same condition. He noted that this rating differed from Dr. Salomon's because he rated appellant as having a class 2 diagnosis for a very severe sensory deficit on the right side, despite previous ratings and EMG evidence suggesting a mild-to-moderate deficit. OWCP's medical adviser found that appellant reached maximum medical improvement on March 28, 2011, the date of evaluation by Dr. Salomon.

By decision dated April 10, 2012, OWCP granted appellant a schedule award for an additional 14 percent permanent impairment of the bilateral lower extremities, relying on the third OWCP medical adviser's October 9, 2011 report.[4]

[3] Table 16-12, pages 534-36 of the sixth edition of the A.M.A., *Guides* is entitled *Peripheral Nerve Impairment -- Lower Extremity Impairments.*

[4] OWCP calculated the following: 9 percent left lower extremity permanent impairment + 9 percent right lower extremity permanent impairment -- 4 percent left lower extremity permanent impairment previously paid per OWCP decision dated April 6, 2011 = 14 percent additional schedule award pay for the bilateral lower extremities.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 mater which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides,* published in 2009.[7]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[8] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

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

OWCP accepted that appellant sustained a herniated disc at L4-5 and L5-S1 due to factors of his federal employment. On April 6, 2011 it granted him a schedule award for four

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[6] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also* 5 U.S.C. § 8107.

[7] *See D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* 3 (6th ed., 2009) section 1.3, International Classification of Functioning, Disability and Health (ICF): *A Contemporary Model of Disablement.*

[9] *Id.* at 494-531.

[10] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[11] *See R.L.*, Docket No. 11-1661 (issued April 25, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *supra* note 7, Chapter 2.808.6(d) (August 2002).

percent permanent impairment of the left lower extremity. In an April 10, 2012 award of compensation, OWCP granted appellant a schedule award for an additional 14 percent permanent impairment of the bilateral lower extremities, relying on an OWCP medical adviser's October 9, 2011 report. Appellant claimed entitlement to increased schedule award compensation.

On March 28, 2011 Dr. Salomon, a treating physician, concluded that appellant had a 16 percent permanent impairment of the right lower extremity and a 9 percent permanent impairment of the left lower extremity. On October 9, 2011 a third OWCP medical adviser determined that appellant had a nine percent permanent impairment for each lower extremity. The A.M.A., *Guides* indicate that the steps to be used in performing an impairment rating for lower extremities include that a diagnosis for each part of the lower limb is to be rated.[12] Section 16.2 indicates that the regions to be assessed separately include foot and ankle, knee and hip.[13] The Board finds that the record is not clear as to whether the medical adviser calculated each lower extremity separately, as required. Thus, the Board further finds that OWCP did not follow the analysis outlined in the A.M.A., *Guides* in developing the medical evidence before granting the schedule award on April 10, 2012.

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[14] Accordingly, once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.[15] The report from OWCP's medical adviser is insufficient to resolve the issue of whether appellant was entitled to an additional schedule award, thus, OWCP did not properly discharge its responsibilities in developing the record.[16] Therefore, the case must be remanded to OWCP for a proper impairment analysis of appellant's lower extremities as provided by the A.M.A., *Guides*.[17] Following such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant is entitled to an increased schedule award for his lower extremity conditions.

CONCLUSION

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

[12] A.M.A., *Guides* 497-500 (6th ed., 2009).

[13] *Id.* at 500.

[14] *See Richard E. Simpson*, 55 ECAB 490 (2004).

[15] *See Melvin James*, 55 ECAB 406 (2004).

[16] *See Richard F. Williams*, 55 ECAB 343 (2004).

[17] *See H.R.*, Docket No. 12-448 (issued July 12, 2012) (the Board remanded a case for a proper impairment analysis of appellant's upper extremities as provided by section 15.2 of the A.M.A., *Guides*).

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: March 15, 2013
Washington, DC

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

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

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