

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

D.S., Appellant)	
)	
and)	Docket No. 12-1497
)	Issued: March 18, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2012 appellant, through counsel, filed a timely appeal from a May 8, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether appellant met his burden of proof to establish more than one percent permanent impairment of the left lower extremity.

On appeal appellant's attorney contends that OWCP erroneously indicated that Dr. M. Stephen Wilson, an orthopedic surgeon, failed to address additional permanent

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the May 8, 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).

impairment when he had clearly shown permanent impairment throughout his August 20, 2010 report.

FACTUAL HISTORY

OWCP accepted that appellant, then a 49-year-old city letter carrier, sustained a lumbar strain due to factors of his federal employment.

On March 3, 2010 Dr. Wilson opined that appellant had an 18 percent permanent impairment of the right lower extremity and a 38 percent permanent impairment of the left lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant filed a claim for a schedule award on April 16, 2010.

In a report dated June 28, 2010, an OWCP medical adviser opined that Dr. Wilson misapplied the sixth edition of the A.M.A., *Guides*.

Subsequently, appellant submitted an August 20, 2010 report by Dr. Wilson who opined that appellant had a 24 percent permanent impairment to the right lower extremity and a 5 percent permanent impairment of the left lower extremity due to sensory and motor deficits of the L5 and S1 spinal nerves.

OWCP referred appellant to Dr. Timothy G. Pettingell, a Board-certified physical medicine and rehabilitation specialist, for a second opinion evaluation. In his September 13, 2010 report, Dr. Pettingell reviewed appellant's medical history and conducted a physical examination. He diagnosed L4-5 and L5-S1 spondylosis, L4-5 central canal stenosis with bilateral neural foraminal narrowing and chronic low back pain. Dr. Pettingell found no motor deficit based upon physical examination manual muscle testing. Appellant did not require a gait assistive device and was independent regarding activities of daily living. Dr. Pettingell assigned appellant to class 1 under Table 16-12³ on page 535 of the sixth edition of the A.M.A., *Guides* with the default grade C equal to three percent bilateral lower extremity impairment. He stated that, per Section 16.4c, on page 533,⁴ adjustments were made only for functional history and clinical studies. Therefore, utilizing Table 16-6,⁵ Dr. Pettingell assigned a grade modifier 0 for Functional History (GMFH) and he assigned a grade modifier 0 for Clinical Studies (GMCS) adjustment under Table 16-8⁶ on page 519 as electrodiagnostic testing was normal. He concluded that the overall adjustment resulted in a one percent permanent impairment of each lower extremity.

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 Section 16.4c, page 533 of the sixth edition of the A.M.A., *Guides*, is entitled *Peripheral Nerve Rating Process*.

⁵ Table 16-6, page 516 of the sixth edition of the A.M.A., *Guides*, is entitled *Functional History Adjustment -- Lower Extremity Impairments*.

⁶ Table 16-8, page 519 of the sixth edition of the A.M.A., *Guides*, is entitled *Clinical Studies Adjustment -- Lower Extremities*.

OWCP requested, by memorandum dated October 25, 2010, a medical adviser to review Dr. Pettingell's report concerning bilateral lower extremities.

On November 4, 2010 an OWCP medical adviser reviewed the record and found that Dr. Pettingell described abnormality resulting in impairment only in the left lower extremity. He determined that appellant had a one percent permanent impairment of the left lower extremity and maximum medical improvement was achieved on September 13, 2010.

By decision dated December 8, 2010, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The award ran for 2.88 weeks for the period September 13 to October 3, 2010. It relied on an OWCP medical adviser's November 4, 2010 report as the basis for its determination.

On November 17, 2011 appellant, through his attorney, requested reconsideration and submitted progress reports from Dr. Wilson dated December 14, 2010 through February 28, 2012 and laboratory reports.

By decision dated May 8, 2012, OWCP denied modification of its December 8, 2010 decision on the basis that appellant had not established that he sustained more than a one percent permanent impairment to the left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ 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 matter 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.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁹

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).¹⁰ 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,

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

⁸ See *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁹ 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).

¹⁰ A.M.A., *Guides* (6th ed., 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

Physical Examination (GMPE) and GMCS.¹¹ 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.¹²

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with OWCP's medical adviser providing rationale for the percentage of impairment specified.¹³

ANALYSIS

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

OWCP accepted that appellant sustained a lumbar strain due to factors of his federal employment. In a December 8, 2010 award of compensation, it granted him a schedule award for one percent permanent impairment of the left lower extremity, relying on OWCP's medical adviser's November 4, 2010 report. Appellant claimed entitlement to increased schedule award compensation.

On September 13, 2010 Dr. Pettingell, the second opinion physician, had concluded that appellant had a one percent permanent impairment of each lower extremity. In his November 4, 2010 report, OWCP's medical adviser reviewed Dr. Pettingell's report and found that the doctor described abnormality resulting in impairment only in the left lower extremity. The medical adviser determined that appellant had a one percent permanent impairment of the left lower extremity. The Board finds that the medical adviser did not clearly explain his conclusion regarding appellant's bilateral lower extremity impairment. He did not discuss whether and how Dr. Pettingell misapplied the A.M.A., *Guides* or why his report was deficient regarding the impairment rating for the right lower extremity as opposed to the left lower extremity. Thus, the medical adviser's report is of little probative value.¹⁴ Consequently, the medical evidence is insufficiently developed to properly determine the degree of appellant's bilateral lower extremity permanent impairment.¹⁵

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.¹⁶ Accordingly, once OWCP undertakes

¹¹ A.M.A., *Guides* 494-531 (6th ed., 2009).

¹² See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ See *R.L.*, Docket No. 11-1661 (issued April 25, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *supra* note 9, Chapter 2.808.6(d) (August 2002).

¹⁴ See *Carl J. Cleary*, 57 ECAB 563, 568 n.14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

¹⁵ See *R.L.*, *supra* note 13.

¹⁶ See *Richard E. Simpson*, 55 ECAB 490 (2004).

development of the medical evidence, it has the responsibility to do so in a proper manner.¹⁷ 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.¹⁸ Therefore, the Board finds that the case must be remanded for further development of the evidence and a reasoned medical opinion regarding whether appellant has additional permanent impairment of the lower extremities due to his accepted employment injuries.¹⁹ Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 8, 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 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁷ See *Melvin James*, 55 ECAB 406 (2004).

¹⁸ See *Richard F. Williams*, 55 ECAB 343 (2004).

¹⁹ See *A.R.*, Docket No. 12-207 (issued June 21, 2012).