

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

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**J.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Drexel Hill, PA, Employer**

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**Docket No. 12-1625  
Issued: September 12, 2013**

*Appearances:*  
*Jeffrey P. Zeelander, Esq., for the appellant*  
*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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 26, 2012 appellant, through his attorney, filed a timely appeal from a July 17, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

**ISSUE**

The issue is whether appellant has more than 18 percent impairment to the right lower extremity and 20 percent impairment to the left lower extremity for which he received schedule awards.

On appeal, appellant's attorney requests that the impairment ratings provided by appellant's physicians be given the weight of medical opinion.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board with respect to the denial of appellant's request for authorization of surgery.<sup>2</sup> In a March 9, 2006 decision, the Board affirmed an August 18, 2005 OWCP decision denying appellant's request for authorization of disc replacement surgery. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>3</sup>

On July 21, 2005 appellant filed a claim for a schedule award.

In a November 8, 2007 medical report, Dr. Ronald B. Greene, a Board-certified orthopedic surgeon serving as an impartial medical examiner,<sup>4</sup> advised that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had 72 percent impairment to the right lower extremity which represented a 29 percent whole person impairment. He further advised that appellant had 69 percent impairment to the left lower extremity which represented a 28 percent whole person impairment.

On December 28, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record. He determined that based on the fifth edition of the A.M.A., *Guides* appellant had 18 percent impairment to the right leg and 10 percent impairment to the left leg. Dr. Berman concluded that appellant reached maximum medical improvement on November 8, 2007.

In a February 7, 2008 decision, OWCP granted appellant schedule awards for 18 percent impairment to the right lower extremity and 10 percent impairment to the left lower extremity. Dr. Berman's opinion on permanent impairment was recorded determinative weight.

By letter dated March 13, 2008, appellant, through his attorney, requested reconsideration.

In a February 27, 2008 report, Dr. Kenneth B. Subin, Board-certified in occupational medicine, reviewed the medical record. Under the fifth edition of the A.M.A., *Guides*, he determined that appellant had a class 2 impairment due to his right lower extremity vascular condition. Dr. Subin also had 20 percent impairment to the right lower extremity due to the impact that standing while working as a crossing guard had on his vascular condition and the prophylactic treatment regimen of Coumadin for this condition.

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<sup>2</sup> Docket No. 05-1772 (issued March 9, 2006).

<sup>3</sup> OWCP accepted that on September 8, 1998 appellant, then a 46-year-old letter carrier, sustained a lumbosacral strain, displacement of the intervertebral disc, an aggravation of lumbar degenerative disc disease, phlebitis, thrombophlebitis and a single episode of major depression as a result of lifting his mail satchel. It authorized an intradiscal electrothermal (IDET) procedure which was performed on July 29, 2002. On October 20, 2004 appellant retired from the employing establishment on disability.

<sup>4</sup> The Board notes that Dr. Greene was the second impartial medical examiner selected to resolve a conflict in the medical opinion evidence regarding the extent of permanent impairment to appellant's right and left lower extremities due to his accepted lumbar disc and deep vein thrombophlebitis (DVT) conditions.

On May 4, 2008 Dr. Berman reviewed the medical record, including Dr. Subin's February 27, 2008 report. He noted that Dr. Subin reviewed the medical records but did not examine appellant. Dr. Subin's comments and conclusions were not based on an examination of appellant. He also incorrectly determined that appellant had a class 2 impairment of the right lower extremity as he misquoted the requirements for this class of impairment. Dr. Berman recommended a second opinion evaluation because it had been several years since appellant had undergone an examination. He concluded that his rating as to the extent of appellant's bilateral lower extremity impairment and date of maximum medical improvement were unchanged.

In a June 3, 2008 decision, OWCP denied modification of the February 7, 2008 decision based on Dr. Berman's May 4, 2008 opinion.

By letter dated February 17, 2012, appellant's attorney requested reconsideration.

In an October 10, 2011 report, Dr. Arthur F. Becan, an orthopedic surgeon, reviewed a history of the accepted employment-related injuries and appellant's medical treatment, family and social background. He noted complaints regarding daily and constant lumbar spine pain and stiffness. Appellant had numbness, tingling and radiating pain in both hips and groin. He also had difficulties performing his daily activities. Appellant rated his lumbar pain as 7 to 9 on a scale of 1 to 10. On physical examination, Dr. Becan found that appellant ambulated with a markedly guarded and anatalgic gait. Appellant also used a cane for ambulation. He was unable to perform either calcaneal or equinus gait.

On examination of the lumbar spine, Dr. Becan reported diminished range of motion. There was pitting edema of the left ankle and left pretibial region extending to the left knee. There were no deficits on sensory examination. Dr. Becan diagnosed degenerated and herniated lumbosacral discs at L3-4, L4-5 and L5-S1. Appellant was status post interventional pain management with multiple epidural steroid injections to the lumbar spine. He was also status post lumbar laminectomy with excision of L3-4, L4-5 and L5-S1 discs and insertion of artificial discs in 2004. Appellant had failed artificial discs at L3-4 and L4-5 and was status post removal of these discs with lumbar fusion using spinal instrumentation, pedicle screws and bars from L3-4 and L4-5. He was status post an IDET procedure, insertion of a spinal cord stimulator, bilateral DVT and pulmonary emboli. Appellant had failed low back syndrome. He also had radiculopathy at L4, L5 and S1.

Using Table 16-12 on page 535 of the sixth edition of the A.M.A., *Guides*, Dr. Becan identified the diagnosis as class 2 sciatica and found a class 1 mild motor deficit in the right quadriceps with regard to the right lower extremity.<sup>5</sup> After applying grade modifiers for functional history and clinical studies,<sup>6</sup> he determined that appellant had 32 percent permanent impairment to the right lower extremity. Regarding the left lower extremity, Dr. Becan also identified a class 2 sciatica diagnosis. Appellant had a class 2 moderate motor deficit in the left quadriceps under Table 16-12. After applying grade modifiers for functional history and clinical studies, Dr. Becan determined that appellant had 38 percent permanent impairment to the left

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<sup>5</sup> A.M.A., *Guides* 535, Table 16-12.

<sup>6</sup> *Id.* at 516, 519, Table 16-6, Table 16-8, respectively.

lower extremity. He concluded that appellant reached maximum medical improvement on the date of his examination.

In a December 30, 2011 report, Dr. Leon H. Waller, a Board-certified internist, listed a history of the accepted employment injuries and appellant's medical treatment, social and family background. On physical examination he reported essentially normal findings with the exception of 3+ edema of the left leg extending above the knee, 2+ edema of the right leg to just below the knee, stasis changes to both legs consistent with chronic edema, diminished pulses at +1/+4 at the posterior tibial, dorsalis, pedis, popliteal and radial pulses. Dr. Becan diagnosed a September 8, 1998 occupational low back injury and postthrombotic syndrome of both legs secondary to bilateral DVT. Appellant was status post bilateral DVT due to immobility from the occupationally-induced back injury and insertion of the interior vena cava Greenfields filter and pulmonary emboli. Dr. Waller advised that appellant had a class 2 impairment under the table for evaluation of thrombotic disorders in the sixth edition of the A.M.A., *Guides* because he suffered more than one thrombotic event. He further advised that due to appellant's need for daily diuretic therapy to reduce swelling in his legs and his clinical symptoms of pain and swelling after 30 minutes of standing, appellant had 20 percent whole person impairment of the right leg and 25 percent whole person impairment of the left leg. Dr. Waller concluded that appellant had 45 percent total disability due to the described occupational injury.

On March 9, 2012 Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, reviewed the medical record. He determined that under Table 4-12 on page 69 of the sixth edition of the A.M.A., *Guides*, appellant had 17 percent impairment to the right lower extremity and 20 percent impairment to the left lower extremity due to his accepted employment-related phlebitis and thrombophlebitis. Appellant reached maximum medical improvement on December 30, 2011. Dr. Slutsky stated that the table used by Dr. Waller, which he assumed was Table 9-12 on page 208 of the sixth edition of the A.M.A., *Guides*, did not provide for individual lower extremity ratings and resulted in whole person impairment. He also stated that the examination did not reflect impairment ratings for a lumbosacral sprain or displacement of the lumbar intervertebral disc.

On March 21, 2012 OWCP requested that Dr. Slutsky review Dr. Becan's October 10, 2011 report. On March 21, 2012 Dr. Slutsky recommended a second opinion due to the significant discrepancies between Dr. Becan's findings or examination and those of other physicians of record as to whether appellant had any motor and sensory deficits related to his lumbar or thrombophlebitis condition which was necessary to determine the extent of any bilateral lower extremity impairment. While Dr. Becan stated that he rated impairment using the sixth edition of the A.M.A., *Guides*, OWCP used *The Guides Newsletter* July/August 2009 and some parts of the A.M.A., *Guides* to calculate lower extremity impairment ratings of the low back. Dr. Slutsky advised that it appeared Dr. Becan only used the sixth edition of the A.M.A., *Guides* for his calculations.

By letter dated April 17, 2012, OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion. In a May 24, 2012 report, Dr. Smith reviewed a history of the accepted employment-related injuries and appellant's medical treatment. His chief complaints included chronic back and leg pain with swelling of the legs due to chronic DVT. Dr. Smith reported essentially normal findings on physical examination with

the exception of limited active range of motion of the lumbar spine due to a fusion and complaints of pain although there was no spasm or rigidity during these maneuvers. He found normal findings on neurologic examination. Appellant's left leg was significantly swollen compared to the right side which showed a sign of chronic venous insufficiency and DVT. Dr. Smith diagnosed chronic DVT in both legs. Under the sixth edition of the A.M.A., *Guides*, he determined that appellant had a class 2 impairment with a default rating of 17 percent. Dr. Smith assessed functional history and physical examination modifiers of two each on the right side which resulted in a net modifier of 0 percent and represented a total 17 percent impairment to the right lower extremity. Regarding the left lower extremity, Dr. Smith determined that appellant also had a class 2 impairment with a default rating of 17. Due to additional swelling on the left side, the physical examination modifier was three and the functional history modifier was two. This resulted in a +1 net modifier which required movement to the right of the column and resulted in 20 percent impairment to the left lower extremity.

On June 5, 2012 Dr. Berman reviewed the medical record. He noted Dr. Smith's finding that appellant's lumbar spine had limited motion and there was no focal reflex or motor deficit. Dr. Berman also noted the finding that appellant's left leg was significantly swollen compared to the right side and that both sides showed chronic venous insufficiency and DVT. He determined that, under Table 9-12, Criteria for Rating Impairment due to Thrombotic Disorders, on page 208<sup>7</sup> of the sixth edition of the A.M.A., *Guides*, appellant had a class 2 impairment with a default value of 17 percent which was defined as, having more than one prior thrombotic event, none in the prior year. Dr. Berman applied the grade modifiers to the net adjustment formula for a net adjustment of zero, which resulted in 17 percent impairment to the right lower extremity. He advised that a class 2 impairment was also applicable to the left side. Dr. Berman assessed a grade 3 modifier with a +1 net modifier, which resulted in 20 percent impairment to the left lower extremity. Based on the prior schedule awards, he advised that there was no increase on the right side and there was an increase of 10 percent impairment on the left side. Dr. Berman concluded that appellant reached maximum medical improvement on May 2, 2012.

In a July 17, 2012 decision, OWCP granted appellant a schedule award for an additional 10 percent impairment to the left lower extremity based on Dr. Berman's June 5, 2012 opinion. Appellant was not entitled to an additional schedule award for impairment to the right lower extremity. OWCP noted that the previous schedule award for 18 percent impairment to the right lower extremity and 10 percent impairment to the left lower extremity had already been paid.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>8</sup> and its implementing regulations<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for

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<sup>7</sup> The Board notes that it appears that Dr. Berman inadvertently stated that Table 9-12 was on page 28 rather than page 208 as his findings correspond to the values listed in Table 9-12 on page 208.

<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8107

<sup>9</sup> 20 C.F.R. § 10.404.

loss or 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*.<sup>10</sup>

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>11</sup>

The lower extremity chapter of the A.M.A., *Guides* states that vascular conditions are rated in accordance with section 4.8 of the A.M.A., *Guides* Vascular Diseases Affecting the Extremities, and may be combined with diagnosis-based impairments using the Combined Values Chart.<sup>12</sup>

Section 9.6 Thrombotic Disorders states that impairment is based on both the thrombotic disorder itself and the impact of the thrombosis that have occurred on a particular affected body system. This includes the degree of injury to the end-organ, such as the lungs, heart, brain, kidney and extremities from thrombosis and on how the disorder affects the individual's capacity to perform the activities of daily living. The A.M.A., *Guides* state, "Regardless of the system involved, the rating that results due to the sequelae of thrombotic disease should be combined with the impairment from the thrombotic disease itself (to which is added five percent for the use of anticoagulants, if appropriate, before combining) using the Combined Values Chart in the Appendix."<sup>13</sup>

### ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain, displacement of the intervertebral disc, aggravation of lumbar degenerative disc disease, phlebitis and thrombophlebitis due to factors of his federal employment. On July 20, 2002 appellant underwent an IDET procedure. He received schedule awards compensating him for a total right lower extremity impairment of 18 percent and total left lower extremity impairment of 20 percent.

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<sup>10</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6<sup>th</sup> 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).

<sup>11</sup> A.M.A., *Guides* 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>12</sup> A.M.A., *Guides* 497.

<sup>13</sup> *Id.* at 206-8, section 9.6 Thrombotic Disorders.

Dr. Smith, an OWCP referral physician, examined appellant on May 24, 2012 and described appellant's continued back and leg pain with swelling of the legs due to chronic DVT. He utilized what appears to be Table 9-12 on page 208 of the sixth edition of the A.M.A., *Guides* to rate appellant's chronic DVT as a class 2 impairment with a default rating of 17 percent of the right lower extremity. Dr. Smith determined that appellant had functional history and physical examination modifiers of 2 each which resulted in a net modifier of 0 percent and represented a total 17 percent impairment of the right lower extremity. He also rated appellant's chronic DVT of the left lower extremity as a class 2 impairment with a default rating of 17 percent impairment. Dr. Smith found a physical examination modifier of three and a functional history modifier of two due to additional swelling on the left side. This resulted in a +1 net modifier which required movement to the right of the column and resulted in 20 percent impairment of the left lower extremity.

On June 5, 2012 Dr. Berman, an OWCP medical adviser, reviewed the medical record, including Dr. Smith's findings, and utilized Table 9-12, of the sixth edition of the A.M.A., *Guides* to determine that appellant had a class 2 impairment with a default value of 17 percent which was defined as, having more than one prior thrombotic event, none in the prior year. He applied the grade modifiers to the net adjustment formula for a net adjustment of zero, which resulted in 17 percent impairment to the right lower extremity. Dr. Berman advised that a class 2 impairment was also applicable to the left side. He applied the grade modifiers to the net adjustment formula for a +1 net modifier, which resulted in 20 percent impairment to the left lower extremity. Based on appellant's prior schedule awards, Dr. Berman concluded that there was no increase on the right side and there was an increase of 10 percent impairment on the left side.

The Board finds that this case is not in posture for a decision. The medical evidence did not address appellant's DVT of the bilateral lower extremities under Chapter 4 of the A.M.A., *Guides*. As noted, the A.M.A., *Guides* indicate that vascular conditions of the lower extremities are rated under section 4.8.<sup>14</sup> Table 4-12 sets forth the criteria for rating impairment of a lower extremity due to peripheral vascular disease.<sup>15</sup> Neither Dr. Smith nor OWCP's medical adviser addressed this in rating permanent impairment. The section of the A.M.A., *Guides* addressing thrombotic disorders states that both the disorder and the impact of the disorder on the end system, including the extremities should be rated.<sup>16</sup> As Dr. Smith and OWCP's medical adviser failed to apply the Chapter 4 rating impairment, their reports are of diminished probative medical value.

As the medical evidence of record does not fully comport with the A.M.A., *Guides* or provide a complete analysis of appellant's bilateral lower extremity impairment, the Board finds that the case is not in posture for decision. The case will be remanded to OWCP for additional development of the medical evidence on the extent of impairment of appellant's bilateral lower

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<sup>14</sup> See A.M.A., *Guides* 68.

<sup>15</sup> *Id.* at 69.

<sup>16</sup> *Id.* at 207, section 9.6c Criteria for Rating Permanent Impairment due to Thrombotic Disorders; see e.g., R.W., Docket No. 12-1627 (issued April 2, 2013).

extremities in accordance with the sixth edition of the A.M.A., *Guides* to be followed by a *de novo* decision.

**CONCLUSION**

The Board finds that the case is not in posture for decision as to the extent of appellant's bilateral lower extremity impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 17, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 12, 2013  
Washington, DC

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

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

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