

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

D.B., Appellant)	
)	
and)	Docket No. 13-1996
)	Issued: April 23, 2014
U.S. RAILROAD RETIREMENT BOARD,)	
Chicago, IL, Employer)	
)	

Appearances:
Appellant, pro se
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 August 28, 2013 appellant filed a timely appeal from an August 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. 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 has established more than 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity, for which she received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the August 19, 2013 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). Appellant may submit this evidence to OWCP and request an 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.

On appeal, appellant contends that Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, has been her doctor for over 15 years and requested that any problems with the chart he used be corrected.

FACTUAL HISTORY

This case was previously before the Board.³ Appellant, then a 56-year-old computer specialist, has an accepted occupational disease claim for temporary aggravation of mild asthma and temporary aggravation of preexisting chronic low back pain, resolved December 21, 2006 under File No. xxxxxx017. OWCP awarded her a schedule award for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity under File No. xxxxxx023.⁴ On June 25, 2013 the Board remanded the case for OWCP to double appellant's case files in order to determine whether OWCP properly adjudicated the issue of appellant's schedule award claim.⁵ The facts of the case, as set forth in the prior decision, are incorporated by reference.⁶

On April 8, 2009 appellant filed a claim for a schedule award.

In a September 30, 2009 letter, OWCP notified appellant of the deficiencies of her claim and requested additional medical evidence.

Subsequently, appellant submitted reports dated December 18, 2008 through March 24, 2011 from Dr. Chmell. In a July 9, 2009 report, Dr. Chmell found that appellant's straight leg raising was positive on the right side 70 degrees and left side 60 degrees. He indicated that appellant had diminished sensation and diminished strength at both ankles and feet. On July 20, 2009 Dr. Chmell opined that appellant had a 66 percent permanent impairment to her left lower extremity and a 58 percent permanent impairment to her right lower extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He submitted his calculations on lower extremity worksheets and copies of the A.M.A., *Guides*, including Table 16-11 on page 533,⁷ Table 17-7 on page 576,⁸ Table 17-8 on page 578⁹ and Table 17-9 on page 581.¹⁰

Appellant also submitted reports dated August 2 and October 8, 2010 from Dr. Even G. McLeod, a Board-certified orthopedic surgeon, who indicated that appellant's history was

³ Docket No. 11-1058 (issued March 19, 2012).

⁴ Appellant sustained injuries in the performance of duty on December 15, 1998. Consequently, OWCP accepted the following conditions: lumbar strain; L4-5 disc herniation; and right-sided L5 radiculopathy.

⁵ Docket No. 13-445 (issued June 25, 2013).

⁶ By letter dated July 30, 2013, OWCP notified appellant that her claim had been doubled and her new occupational disease claim under File No. xxxxxx017 was the master case file.

⁷ A.M.A., *Guides* 533, Table 16-11.

⁸ *Id.* at 576, Table 17-7.

⁹ *Id.* at 578, Table 17-8.

¹⁰ *Id.* at 581, Table 17-9.

consistent with a prolonged exacerbation of asthma related to exposure while working at the employing establishment.

On March 16, 2011 an OWCP medical adviser, Dr. Neil Ghodadra, a Board-certified orthopedic surgeon, reviewed the medical evidence of record and disagreed with Dr. Chmell's impairment ratings on the basis that he did not use Table 16-12¹¹ of the A.M.A., *Guides*. He indicated that appellant's history of L4-5 radicular symptoms and subjective sensory deficits with normal motor function corresponded to a class C default rating of four percent permanent impairment of the right and left lower extremities according to Table 16-12 for peripheral nerve impairment. An OWCP medical adviser determined that the date of maximum medical improvement was August 5, 2010.

On October 9, 2011 Dr. Sanjai Shukla, an orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and concurred with Dr. Ghodadra. He further indicated that, although Dr. Chmell referenced tables from Chapter 17 of the A.M.A., *Guides*, the ratings were based on a whole person impairment which was not accepted for schedule award decisions under FECA.

By decision dated February 24, 2012, OWCP denied appellant's claim for a schedule award, indicating that OWCP's medical adviser recommended a four percent permanent impairment of the bilateral lower extremities less any award previously paid. Appellant previously received a schedule award for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity under File No. xxxxxx023 and, therefore, the medical evidence did not support an increase in the impairment already compensated.

On March 27, 2012 appellant requested reconsideration and submitted a March 23, 2012 report from Dr. Chmell who indicated that he failed to use Table 16-12 in his impairment rating because it addressed peripheral neuropathy and peripheral nerve impairment and appellant did not have peripheral neuropathy or a peripheral nerve problem. Dr. Chmell stated that appellant had a disc herniation causing a radiculopathy with resultant weakness and sensory deficit and opined that Dr. Shukla's report should be disregarded because of the usage of Table 16-12 which had no bearing on appellant. On October 11, 2012 Dr. Chmell indicated that appellant's "nerve problem emanates from her lumbar spine with pressure on a spinal nerve not a peripheral nerve."

On August 18, 2012 an OWCP medical adviser, Dr. Christopher Gross, an orthopedic surgeon, reviewed the medical evidence of record to determine if additional impairment should be awarded to appellant. He concurred with the previous medical advisers' assessments that using Table 16-12 the L4-5 radicular symptoms with normal function and subjective sensory deficits corresponded to a class 1 diagnosis with a class C default rating, equaling four percent permanent impairment to each lower extremity.

By decision dated August 19, 2013, OWCP denied modification of its February 24, 2012 decision.

¹¹ *Id.* at 534-36, Table 16-12.

LEGAL PRECEDENT

The schedule award provisions of FECA¹² 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.¹³ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.¹⁴

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).¹⁵ Under the sixth edition, the evaluator identifies 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).¹⁶ 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.¹⁷

ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of mild asthma and temporary aggravation of preexisting chronic low back pain, resolved December 21, 2006, due to factors of her federal employment. It awarded her a schedule award for 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity. It is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment.¹⁸

In accordance with its procedures, OWCP properly referred the evidence of record to its medical adviser, Dr. Gross, who, in an August 18, 2012 report, reviewed the clinical findings of Dr. Chmell and assessed that appellant's L4-5 radicular symptoms with normal function and

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

¹³ See *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). See also 5 U.S.C. § 8107.

¹⁴ 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).

¹⁵ A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.

¹⁶ *Id.* at 494-531.

¹⁷ See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁸ See *Annette M. Dent*, 44 ECAB 403 (1993).

subjective sensory deficits was a class 1 with the default grade C according to Table 16-12 of the sixth edition of the A.M.A., *Guides*, equaling a four percent permanent impairment of the right and left lower extremities. In an October 9, 2011 report, Dr. Shukla, an OWCP medical adviser, further indicated that, although Dr. Chmell referenced tables from Chapter 17 of the A.M.A., *Guides*, his ratings were invalid as they were based on a whole person impairment.

The Board finds that OWCP's medical advisers applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Chmell's clinical findings. OWCP's medical advisers' calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. The medical advisers explained that Dr. Chmell's assessment of a 66 percent permanent impairment to the left lower extremity and a 58 percent permanent impairment to the right lower extremity were based on a whole person impairment rating, which was not allowed for purposes of making schedule award decisions under FECA.¹⁹ Therefore, OWCP properly relied on an OWCP medical adviser's assessment of a four percent permanent impairment of the right and left lower extremities, in denying an additional schedule award pay for the bilateral lower extremities.

The reports from Dr. McLeod do not provide an impairment rating based on the sixth edition of the A.M.A., *Guides*. Thus, these reports are of no probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.²⁰

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established that she is entitled to a schedule award greater than that previously received.²¹

On appeal, appellant contends that Dr. Chmell has been her doctor for over 15 years and requested that any problems with the chart he used be corrected. As previously stated above, she has the burden of proof to submit sufficient evidence to establish the extent of her permanent impairment.²²

¹⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied. See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, *supra* note 14.

²⁰ See *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

²¹ FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

²² See *supra* note 17.

CONCLUSION

The Board finds that appellant has not established that she sustained more than 30 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the left lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2014
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