United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 13-2107**
	)	**Issued: April 21, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2013 appellant filed a timely appeal from an August 20, 2013 schedule award 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 over the merits of the schedule award decision.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish more than a 16 percent impairment of the left lower extremity for which he received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that appellant submitted evidence with his appeal to the Board. The Board may not consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On August 18, 2010 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that heavy, continuous lifting and bending caused degenerative lumbar disc disease. He stopped work on July 29, 2010. OWCP accepted that appellant sustained an employment-related aggravation of degeneration of lumbar or lumbosacral intervertebral disc and displacement of intervertebral lumbar disc without myelopathy. On August 13, 2010 Dr. Joseph A. Traina, a Board-certified neurosurgeon, performed a hemilaminectomy at L3-4 and L4-5. A November 9, 2010 electrodiagnostic study of the lower extremities was interpreted by Dr. Ray Lopez, an attending Board-certified neurologist, as compatible with denervation at left L4-5 with evidence of left S1 nerve compression and/or irritation. Appellant was placed on the periodic compensation rolls.

On April 6, 2011 appellant filed a schedule award claim. By letter dated April 19, 2011, OWCP asked Dr. Lopez to provide an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] In an April 13, 2011 report, Dr. Lopez noted that appellant complained of radiating low back pain and left leg weakness. He provided physical examination findings that included left thigh atrophy and loss of sensation along the lateral aspect of the left thigh and calf. Dr. Lopez diagnosed herniated lumbar disc with postoperative left L4 root motor residual and evidence of nerve root compression with both weakness and sensory abnormality in the left leg, a portion of which involved the left L5 root; multisegmental degenerative lumbar disc disease; right ankle arthritis associated with overuse during rehabilitation of the left leg; left ulnar neuropathy; obstructive sleep apnea; status post arthroscopic left knee surgery; and borderline hypertension. He advised that appellant remained disabled for gainful employment and that, under the A.M.A., *Guides*, he had a nine percent whole person impairment due to a herniated disc at L3-4 with postoperative residuals of L4 motor impairment with atrophy and L5 sensory impairment.

On May 18, 2011 Dr. H.P. Hogshead, an OWCP medical adviser and a Board-certified orthopedist, noted his review of the medical record. He advised that, in accordance with proposed Table 2, spinal nerve Impairment, lower extremity, found in *The Guides Newsletter* of July and August 2009, for an L4 injury, appellant had 13 percent moderate motor impairment and 3 percent moderate sensory impairment, for a total left leg impairment of 14 percent, with April 13, 2011 the date of maximum medical improvement.

On May 19, 2011 OWCP informed appellant that he was entitled to a schedule award but since he was receiving wage-loss compensation, it could not process the schedule award at that time. It stated that he could receive both schedule award compensation and Office of Personnel Management retirement benefits. On May 23, 2011 disability retirement was approved by the social security administration.

In June 2011, OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second-opinion evaluation to determine whether appellant continued to

[3] A.M.A., *Guides* (6th ed. 2008).

have residuals of employment injuries and his work capability. In a July 29, 2011 examination report, Dr. Lopez diagnosed status post lumbar laminectomy at L4 and probable neuropraxia at S1. He recommended lower extremity electrodiagnostic studies that were done on August 15, 2011 and were interpreted as suggestive of a left L4-5 nerve root lesion. In an undated supplementary report, Dr. Lotman advised that the electrodiagnostic study findings were consistent with appellant's physical findings of weakness and dysesthesias with possible diagnoses of inadequate disc decompression, recurrent disc herniation or chronic arachnoiditis from scar tissue formation. He recommended referral to appellant's surgeon for evaluation and advised that appellant could return to sedentary duty and that he would be a candidate for vocational rehabilitation. Dr. Lotman did not perform an impairment evaluation.

By report dated February 17, 2012, Dr. Lopez advised that appellant had reached maximum medical improvement as of August 13, 2011. He described residual symptoms of low back pain and left leg pain and weakness, with absolute loss of sensation along the lateral aspect of left thigh and calf, moderate motor weakness of the left extensors of the great toe and evertors of the left foot and atrophy of the left quadriceps muscle. Dr. Lopez advised that, in accordance with the proposed A.M.A., *Guides* for rating spinal nerve impairments, appellant had a very severe sensory loss of left L4 for 7 percent impairment, a severe sensory loss at left L5 for 6 percent impairment, a moderate motor loss at L4 for 13 percent impairment and a mild motor loss at L5 for 5 percent impairment, which yielded a total left lower extremity impairment of 31 percent.

On March 2, 2012 Dr. Hogshead, the medical adviser, noted that the November 9, 2010 and August 15, 2011 electrodiagnostic studies were compatible, showing a finding of left L4 motor and sensory nerve root injury. He concluded that, in accordance with *The Guides Newsletter* of July and August 2009, for an L4 injury, appellant had 13 percent moderate motor impairment for injury to the L4 motor nerve root and three percent impairment for injury to the L4 sensory nerve root, for a total left lower extremity impairment of 16 percent, with April 13, 2011 the date of maximum medical improvement.

Dr. Lopez continued to submit reports describing his findings and conclusions.

In June 2012, OWCP referred appellant to Dr. Gilbert D. Beauperthuy, a Board-certified osteopath specializing in orthopedic surgery, for a second-opinion evaluation, including an impairment evaluation. In a July 6, 2012 report. Dr. Beauperthuy advised that lower extremity examination demonstrated 5/5 motor strength bilaterally except 4/5 ankle extensor strength on the left. Sensation over the L4 nerve distribution appeared diminished to pinprick examination and there was left thigh and calf atrophy. Dr. Beauperthuy advised that the objective findings on physical examination and electrodiagnostic studies correlated with appellant's subjective complaints for a diagnosis of lumbar radiculopathy. He advised that, in accordance with *The Guides Newsletter* of July and August 2009, appellant had severe sensory loss at L4 for 6 percent impairment and a moderate motor loss at L4 for 11 percent impairment, for a total left lower extremity impairment of 17 percent.

In reports dated July 6, 2012, Dr. John P. Wilkerson, a Board-certified orthopedist, diagnosed a right knee internal derangement and advised that appellant could work modified duty. Appellant continued to submit reports describing his right knee condition.

On August 6, 2012 OWCP forwarded Dr. Beauperthuy's July 6, 2012 impairment evaluation to Dr. Lopez for review. In a September 26, 2012 report, Dr. Lopez advised that he had reviewed the July 6, 2012 report, noting that the discussion and rating were limited to the L4 segment. He maintained that the L5 segment was also involved.

In September 2012, OWCP referred appellant to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second-opinion evaluation in regard to residuals of the accepted conditions and appellant's work capacity. In a September 24, 2012 report, Dr. Millheiser noted his review of record and appellant's complaints of sharp back pain, left lower extremity numbness and weakness and right knee pain. Lumbar spine examination demonstrated decreased range of motion, no tenderness and mild spasm. Left leg examination demonstrated hypesthesia about the entire circumference of the left leg below the knee and left thigh and calf atrophy. Dr. Millheiser diagnosed postlumbar laminectomy and right knee pain. He opined that appellant's right knee condition was not related to his back problems and advised that he could perform sedentary work on a part-time or full-time basis.

On November 8, 2012 Dr. James W. Dyer, an OWCP medical adviser who is Board-certified in orthopedic surgery, agreed that, in accordance with *The Guides Newsletter* of July and August 2009, appellant had a left lower extremity L4 nerve root sensory deficit of 6 percent and a motor deficit of 11 percent, for a total left lower extremity impairment of 17 percent, with maximum medical improvement reached on July 6, 2012.

In December 2012, OWCP determined that conflicts in medical evidence had been created between Dr. Lopez and Dr. Millheiser regarding appellant's work capacity and between Dr. Lopez and Dr. Beauperthuy regarding the degree of appellant's left leg impairment. It referred appellant to Dr. Jay E. Stein, a Board-certified orthopedic surgeon, for an impartial evaluation. On December 12, 2012 Dr. Lopez advised that appellant's condition was unchanged.

In a January 14, 2013 report and attached work capacity evaluation, Dr. Stein reported his review of the medical records, appellant's work history and his complaint of constant lower back pain. He described examination findings including a negative straight leg raising, decreased sensation over the dorsal aspect of the left foot and lateral aspect of the left calf and thigh. Lower extremity strength was 5/5 and left calf and thigh atrophy was present. Dr. Stein diagnosed status post lumbar laminectomy at L4-5, left L4 nerve root residual, status post left knee surgery and right knee pain. He indicated that appellant was at maximum medical improvement and opined that his right knee symptoms were unrelated to employment duties. Dr. Stein advised that appellant could perform sedentary duties full time with permanent physical restrictions. He concluded that appellant had 4 percent impairment attributable to a moderate sensory loss in the L4 distribution and 11 percent moderate motor loss in the L4 distribution, for a combined 15 percent impairment of the left lower extremity.

By report dated February 13, 2013, Dr. Hogshead, an OWCP medical adviser, noted his review of Dr. Stein's January 14, 2013 report. He compared Dr. Stein's conclusion that appellant had a 15 percent left lower extremity impairment, with that of Dr. Dyer dated November 8, 2012, who found 16 percent impairment. Dr. Hogshead indicated that the difference lay in the application of *The Guides Newsletter* tables. He stated that the difference related to the choice of a moderate sensory loss or a severe sensory loss and this was subjective.

The medical adviser concluded that the rules for such difference of opinion placed the deciding opinion with the referee and concluded that appellant had 15 percent impairment of the left lower extremity.

On March 21, 2013 OWCP referred appellant for vocational rehabilitation. On April 5, 2013 appellant elected civil service retirement benefits, effective June 5, 2013.

In a June 12, 2013 report, Dr. Lopez reiterated his findings and conclusions and maintained that appellant had both left L4 and L5 nerve root residuals. On July 31, 2013 Dr. Hogshead, the medical adviser, advised that maximum medical improvement was reached on January 11, 2011.

On August 20, 2013 appellant was granted a schedule award for 16 percent impairment of the left lower extremity, for a total of 46.08 weeks, to run from June 5, 2013 to April 23, 2014.[4] OWCP stated that the impairment was based on the findings of Dr. Stein and the medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations,[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[9] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a

[4] OWCP noted that appellant's schedule award compensation began the date his FECA wage-loss compensation ended.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[10]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[11] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in *The Guides Newsletter* of July and August 2009.[12]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

OWCP's procedures further provide that, while an OWCP medical adviser may review the opinion of a referee specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility and not that of the medical adviser, who should not resolve the conflict of medical opinion or attempt to clarify or expand the opinion of the medical referee. If clarification is necessary, a supplementary report should be obtained from the referee specialist.[16]

ANALYSIS

OWCP accepted that appellant sustained degeneration of a lumbar intervertebral disc and displacement of intervertebral lumbar disc without myelopathy. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Stein, who provided an impartial medical

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[12] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[13] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[14] 20 C.F.R. § 10.321.

[15] *V.G.*, 59 ECAB 635 (2008).

[16] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(g)(1, 2) (February 2013); *see K.O.*, Docket No. 11-814 (issued December 21, 2011); *Robert R. Lemay*, 56 ECAB 341 (2005).

evaluation for OWCP regarding the degree of appellant's left lower extremity impairment. Dr. Stein's opinion comported with section 3.700 of OWCP's procedures, which memorializes proposed tables outlined in *The Guides Newsletter* of July and August 2009. His opinion establishes that appellant has 15 percent impairment of the left leg.

OWCP determined that a conflict in medical evidence was created between Dr. Lopez, an attending neurologist, and Dr. Beauperthuy, an orthopedist, who provided a second-opinion evaluation for OWCP regarding the degree of appellant's left lower extremity impairment. It referred appellant to Dr. Stein for an impairment evaluation. In his January 14, 2013 report, Dr. Stein described physical examination findings including decreased sensation over the dorsal aspect of the left foot and lateral aspect of the left calf and thigh with lower extremity strength of 5/5 and left calf and thigh atrophy. He diagnosed status post lumbar laminectomy at L4-5, left L4 nerve root residual, status post left knee surgery and right knee pain. Dr. Stein indicated that appellant was at maximum medical improvement. He concluded that appellant had 4 percent impairment attributable to a moderate sensory loss in the L4 distribution and 11 percent moderate motor loss of the L4 distribution, for a combined 15 percent impairment of the left lower extremity.

By report dated February 13, 2013, Dr. Hogshead, an OWCP medical adviser, compared Dr. Stein's report, which found a 15 percent left lower extremity impairment, with that of Dr. Dyer dated November 8, 2012, which found a 16 percent impairment, both impairment finding due to L4 motor and sensory loss of the left lower extremity. He indicated that the difference lay in the application of *The Guides Newsletter* tables. Dr. Hogshead stated that the difference related to the choice of a moderate sensory loss or a severe sensory loss, which was subjective. He correctly noted that when there is a difference of opinion, the deciding opinion is that of the referee,[17] which in this case was Dr. Stein. Dr. Hogshead concluded that appellant had 15 percent impairment of the left lower extremity.

The Board has carefully reviewed the opinion of Dr. Stein and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Stein's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history. He accurately summarized the relevant medical evidence and provided medical rationale that appellant had L4 sensor and motor deficits which yielded a 15 percent left lower extremity impairment. This finding is in accordance with proposed Table 2 of *The Guides Newsletter*, found in exhibit 4 of section 3.700 of OWCP's procedures.[18] Dr. Stein's opinion is consequently entitled to special weight as the impartial medical examiner and establishes that appellant has 15 percent impairment of the left lower extremity.

Appellant therefore did not meet his burden of proof to establish that he has impairment of his left lower extremity greater than the 16 percent previously awarded. On appeal, he asserts that Dr. Stein should have provided additional impairment for L5. However, Dr. Stein's January 14, 2013 report did not indicate that any impairment for L5 was warranted.

[17] *Id.*

[18] *Supra* note 12.

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 did not establish that he has greater than the 16 percent left leg impairment for which he has already received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 21, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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