United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 13-1295**
	)	**Issued: July 22, 2014**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Denver, CO, Employer	)	

Appearances:
Alan J. Shapiro, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2013 appellant, through his attorney, filed a timely appeal from an April 1, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for 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 schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award for a permanent impairment of an upper extremity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 1, 2001 appellant, then a 47-year-old tractor trailer operator, injured his neck in the performance of duty. OWCP accepted the claim, assigned file number xxxxxx615, for cervical strain and displacement of a cervical intervertebral disc without myelopathy. On April 1, 2002 appellant underwent an anterior cervical discectomy and fusion at C5-6. He returned to his usual employment on July 24, 2002. On October 30, 2003 appellant underwent an anterior three-level arthrodesis at C4-5, C5-6 and C6-7, a revision anterior cervical two-level corpectomy at C5-6, an anterior cervical instrumented fusion, a posterocervical laminotomy and instrumented fusion and a structural fibular allograft.

OWCP also accepted that on June 13, 2007 appellant sustained lumbar and sacroiliac ligament sprains under file number xxxxxx637.

In a decision dated February 23, 2007, OWCP denied appellant's claim for a schedule award. It found that he had not submitted sufficient evidence to support that he sustained a permanent impairment of the upper extremities due to his cervical spine injury. In decisions dated June 15 and September 7, 2007 and May 20, 2008, OWCP denied modification of its February 23, 2007 decision.

On July 12, 2010 appellant filed another claim for a schedule award. By letter dated July 20, 2010, OWCP requested that he submit an impairment evaluation from his attending physician addressing whether he had reached maximum medical improvement and providing an impairment rating using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

In a report dated July 29, 2010, Dr. Thomas K. Lee, a Board-certified orthopedic surgeon, measured full range of motion of the upper extremities on examination. He found that appellant had reached maximum medical improvement and could resume work without restrictions.

On November 8, 2010 OWCP referred appellant to Dr. Richard T. Katz, a Board-certified physiatrist, for an impairment evaluation. In a report dated November 23, 2010, Dr. Katz discussed appellant's symptoms of low back and cervical pain with numbness of digits four and five bilaterally. On examination he found decreased sensation in the fourth and fifth digits, full muscle strength of the upper and lower extremities and a negative straight leg raise. Dr. Katz concluded that appellant had no impairment of the extremities as he had "no residual evidence of radiculopathy in the neck or low back."

On November 30, 2010 an OWCP medical adviser reviewed Dr. Katz' opinion and concurred with his finding that appellant had no impairment of the upper or lower extremities.

By decision dated December 8, 2010, OWCP denied appellant's claim for a schedule award. It found that he had no impairment due to either his December 1, 2001 or his June 13, 2007 work injuries.

In a report dated January 11, 2011, Dr. Lee diagnosed lumbar radiculopathy due to the June 13, 2007 work injury. On examination, he found a positive straight leg raise and weakness

in the right extensor hallices longus consistent with instability at L3-4. Dr. Lee opined that appellant had 12 percent impairment under the sixth edition of the A.M.A., *Guides*.

On March 14, 2011 appellant requested reconsideration.

On April 29, 2011 Dr. Daniel Zimmerman, an OWCP medical adviser, reviewed Dr. Lee's January 11, 2011 report. He stated that the 12 percent impairment rating seemed to be a whole person impairment rating under Chapter 17. Dr. Zimmerman found that as Dr. Lee failed to provide a rating in accordance with the A.M.A., *Guides*, his report did not support permanent impairment to any extremity.

By decision dated May 11, 2011, OWCP denied modification of its December 8, 2010 decision.

On October 5, 2011 appellant requested reconsideration. He submitted a November 7, 2011 report from Dr. Lee who related that appellant had an impairment of the lower extremities due to his work-related lumbar sprain. Dr. Lee determined that appellant had 16 percent impairment due to olisthesis at L3-4 of 16 percent and 10 percent impairment due to olisthesis at L4-5.

On December 27, 2011 an OWCP medical adviser found that Dr. Lee's report did not support entitlement to a schedule award as he rated appellant's impairment using Table 17-4 on page 571 of the sixth edition of the A.M.A., *Guides*, relevant to determining impairments of the spine due to spondylolithesis. He further noted that it was a whole body impairment rating, which did not conform to OWCP protocols.

By decision dated January 13, 2012, OWCP denied modification of its May 11, 2011 decision.

In a report dated August 17, 2012, Dr. M. Stephen Wilson, an attending orthopedic surgeon, reviewed the history of injury and discussed appellant's current complaints of neck pain radiating into the extremities and tingling. On examination he stated:

> "Cervical pain radiates into the bilateral upper extremities with numbness and tingling. Weakness against resistance is demonstrated in the cervical flexors and extensors. Weakness is also demonstrated in the bilateral shoulders, elbows and wrists against resisted flexion and extension. Jamar dynamometry testing 43 pounds of force produced with the right hand and 34 pounds of force produced with the left hand. Decreased sensation to monofilament testing is noted in the C5, C6 and C7 dermatomes of the bilateral upper extremities. There is decreased two point discrimination with testing in the C5, C6 and C7 nerve distributions of the bilateral upper extremities, with no discernment with distances less than [six] [millimeters] but retained discrimination at distances greater than [six] [millimeters]."[1]

Dr. Wilson attributed appellant's cervical condition to his employment injury. Citing Proposed Table 1 of *The Guides Newsletter* (July/August 2009), he found that appellant had a class 1 sensory deficit of the C5 nerve root which yielded a default value of four percent.

Dr. Wilson applied grade modifiers of one for functional history of pain with strenuous activity and a grade modifier of zero for clinical studies. Applying the net adjustment formula moved the rating one place to the left and yielded two percent impairment due to C5 nerve root radiculopathy bilaterally. Dr. Wilson further applied Proposed Table 1 of *The Guides Newsletter* and grade modifiers to find six percent impairment due radiculopathy and mild motor deficits at C6 bilaterally and two percent impairment due to radiculopathy at C7 bilaterally. He concluded that appellant had a 10 percent impairment of each upper extremity.

On January 2, 2013 appellant, through his attorney, requested reconsideration.

On March 17, 2013 Dr. Zimmerman advised that Dr. Wilson's August 17, 2012 report did not support an impairment rating. Dr. Wilson did not conduct sensory testing of any extremity but found sensory symptoms based on appellant's subjective complaints. He did not perform proper strength testing as he did not measure with a dynameter three times or using five different positions to determine the credibility of the measurements by seeing if the distribution was bell shaped. Dr. Zimmerman found that Dr. Wilson also failed to consider other medical explanations for appellant's lack of strength, such as peripheral entrapment neuropathy or tendinitis. The medical adviser determined that Dr. Wilson should not have applied grade modifiers based on the clinical studies in reaching his impairment determination as clinical studies were included in the diagnosis.

By decision dated April 1, 2013, OWCP denied modification of its January 13, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[2] and its implementing federal regulation,[3] 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.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

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),

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] 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).

Physical Examination (GMPE) and Clinical Studies (GMCS).[6] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments.[7] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[8] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[9]

ANALYSIS

OWCP accepted that appellant sustained cervical strain and the displacement of a cervical intervertebral disc without myelopathy due to a December 1, 2001 work injury. On April 1, 2002 appellant underwent a C5-6 anterior discectomy and fusion and on October 30, 2003 he underwent arthrodesis at C4-5, C5-6 and C6-7.

Appellant filed a claim for a schedule award. He submitted reports from Dr. Lee who rated whole person impairments of the spine. FECA, however, does not provide for impairment of the whole person.[10] Further, it specifically excludes the back as an organ and, therefore, the spine does not come under the provisions for payment of a schedule award.[11]

On November 23, 2010 Dr. Katz, a second opinion examiner, found a loss of sensation in the fourth and fifth digits with no loss of muscle strength in the upper extremities. He advised that appellant had no impairment as he had no findings of radiculopathy.

In a report dated August 17, 2012, Dr. Wilson found that appellant had a loss of sensation in the C5, C6, and C7 dermatomes based on monofilament testing and two-point discrimination testing. He found weakness with range of motion in the upper extremities by measuring weakness against resistance and measuring strength using dynamometry testing. Dr. Wilson cited the tables and provisions of *The Guides Newsletter* to evaluate appellant's upper extremity impairment. He applied grade modifiers, including clinical studies, and determined that appellant had a two percent impairment due to sensory loss at C5 bilaterally, a six percent impairment due to loss of sensation and a mild motor deficit at C6 bilaterally and a two percent impairment due to sensory loss at C7 bilaterally. As noted by Dr. Zimmerman, however, Dr. Wilson did not consider whether other factors could not result in the upper extremity

[6] A.M.A., *Guides* 494-531.

[7] *See L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010); *see R.M.*, Docket No. 12-1811 (issued March 14, 2013).

[9] *Id*.

[10] *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[11] *See Francesco C. Veneziani*, 48 ECAB 572 (1997).

impairment. He included clinical studies as a grade modifier even though it was used to identify the diagnosis.[12] Dr. Wilson additionally did not verify the strength testing using multiple measurements and found sensory impairment based on appellant's subjective history as opposed to sensory testing. Consequently, his opinion is of relevant probative value and insufficient to establish that appellant sustained permanent impairment of either arm.

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 has not established permanent impairment of either upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.[13]

Issued: July 22, 2014
Washington, DC

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

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

[12] *See* A.M.A., *Guides* 407.

[13] Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.