United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 14-1535**
	)	**Issued: November 18, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Seattle, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2014 appellant, through counsel, filed a timely appeal from a March 25, 2014 merit 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 case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has a permanent impairment due to an accepted back condition.

On appeal appellant's attorney asserts that the March 25, 2014 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 22, 1998 appellant, then a 30-year-old mail carrier, was involved in an employment-related motor vehicle accident. He returned to work in August 1998. OWCP accepted cervical subluxation at C3 and C7, thoracic subluxation at T3 and T10, lumbar subluxation at L5 and a right shoulder contusion. In 2002 appellant began modified duty.[2]

On January 5, 2012 appellant filed a schedule award claim. By letter dated January 13, 2012, OWCP advised him that he needed to furnish a description of any impairment from a physician 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 August 17, 2012 decision, OWCP denied appellant's schedule award claim. It found that the evidence was insufficient to establish permanent impairment to a scheduled member.

On August 20, 2012 appellant submitted a May 16, 2012 impairment rating by Dr. Michael E. Hebrard, a Board-certified physiatrist, who noted the history of injury and that appellant had not worked in seven years. Dr. Hebrard reported that a May 16, 2012 magnetic resonance imaging (MRI) scan of the lumbosacral spine demonstrated spondylosis without central canal stenosis and a disc bulge at L5-S1.[4] Physical examination demonstrated normal sensory examination bilaterally and motor strength of 5/5 except ankle dorsiflexion, inversion and eversion which were 5/5 on the right and 4+/5 on the left. Dr. Hebrard found demonstrated mild weakness in the L5-S1 myotome. He diagnosed contusion of the right elbow and forearm and closed dislocations of unspecific cervical, thoracic and lumbar vertebrae. Dr. Hebrard advised that appellant did not have any residuals involving the cervical spine or upper extremities and had a mild residual impairment at the L5-S1 myotome distribution.

Dr. Hebrard rated the lower extremity impairment in accordance with the July/August 2009 *The Guides Newsletter* and found a mild motor deficit of the left lower extremity based on L5, for class 1 impairment with a default grade C or a five percent impairment. Dr. Hebrard found grade modifiers of 1 for physical examination and functional history, and a modifier of 2 for clinical studies. Applying the net adjustment formula yielded a net adjustment of +1, which increased appellant's L5 impairment to class D or seven percent impairment. Dr. Hebrard further found that appellant had a mild motor deficit at the S1 level, for a class 1 impairment with a default grade of C for four percent impairment. He then added the L5 and S1 values, concluding that appellant had a total 11 percent left lower extremity impairment.

[2] Appellant has an additional claim accepted for right wrist extensor tendinitis and right de Quervain's tendinitis, adjudicated by OWCP under file number xxxxxx405. File number xxxxxx405 case has previously been before the Board, with its most recent decision, Docket No. 10-1325 (issued on February 14, 2011). The instant case was adjudicated under file number xxxxxx445.

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

[4] A copy of the MRI scan study was submitted to OWCP on November 2, 2012.

In an October 24, 2012 decision, an OWCP hearing representative vacated a prior August 17, 2012 decision and remanded the case for an OWCP medical adviser to review Dr. Hebrard's report.

In a November 5, 2012 report, Dr. Kenneth D. Sawyer, an OWCP medical adviser, reviewed Dr. Hebrard's report. He disagreed with Dr. Hebrard's impairment rating, finding that it was unclear if his physical examination findings were related to the lumbar spine or July 22, 1998 injury. Dr. Sawyer further noted that Dr. Hebrard did not address whether he conducted any testing for effort or consistency as recommended by the A.M.A., *Guides*. He recommended a second opinion evaluation and electrodiagnostic testing.

On November 20, 2012 OWCP requested that Dr. Hebrard review Dr. Sawyer's report. In a supplemental report dated December 12, 2012, Dr. Hebrard advised that appellant had severe spinal stenosis on the left at L5-S1 which led to radiculopathy, or the nerve root impairment as found in his previous report.

On January 7, 2013 Dr. Sawyer reviewed Dr. Hebrard's supplemental report. He stated that Dr. Hebrard reaffirmed his prior rating without providing any new objective information. Dr. Sawyer again recommended a second opinion examination.

In January 2013 OWCP referred appellant to Dr. John S. Wendt, a Board-certified neurologist, for a second opinion evaluation. In a February 4, 2013 report, Dr. Wendt noted the history of injury and appellant's complaint of low back pain. He reviewed the statement of accepted facts and medical record, including Dr. Hebrard's reports and an MRI scan study. Motor examination demonstrated no clinical atrophy or fasciculations. Strength was 5/5 in all major muscle groups of the upper and lower extremities, including the distal left lower extremity with the exception that there could be slight left thumb extensor weakness, but other grips in the left hand were intact such that the significance of the weakness was unclear. Sensory examination was normal to touch and pin throughout all major dermatomal groups in upper and lower extremities. Reflexes were 2+ and symmetric in upper extremities and at the knees, trace to 1+ and symmetric at ankle with or without reinforcement and there was no ankle clonus or flexor plantar. Dr. Wendt diagnosed injury-related lumbar sprain, cervical strain and right elbow contusion, resolved, and cervical and lumbar degenerative disc disease that was preexisting and not injury related. He advised that maximum medical improvement had been reached on January 26, 1999. Based on the physical examination, Dr. Wendt concluded that appellant had no neurologic deficit referable to a cervical or lumbar spinal nerve root and therefore no ratable limb disability. He further advised that electrodiagnostic testing was not indicated.

On February 22, 2013 Dr. Sawyer reviewed Dr. Wendt's report. He agreed that appellant had no work-related permanent impairment of either lower extremity.

By decision dated March 4, 2013, OWCP denied appellant's schedule award claim. It found the weight of the evidence rested with the opinion of Dr. Wendt.

Appellant, through his attorney, timely requested a hearing. The requested hearing was held on August 14, 2013.[5] At the hearing appellant's attorney argued that *The Guides Newsletter* lacked scientific validity and referenced a separate upper extremity claim. He maintained that a conflict in medical evidence had been created between Dr. Hebrard and Dr. Wendt regarding appellant's impairment. Appellant testified regarding his back condition.

In a March 25, 2014 decision, an OWCP hearing representative affirmed the March 4, 2013 decision. He found that Dr. Hebrard did not adequately explain how his impairment rating was related to the July 22, 1998 employment injury and failed to provide a suitable impairment rating related to appellant's work injury. As such, Dr. Hebrard's opinion was not sufficient to create a conflict in medical evidence with Dr. Wendt.

LEGAL PRECEDENT

The schedule award provision of FECA,[6] and its implementing federal regulations,[7] 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.[8] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used to calculate schedule awards.[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, for lower extremity impairments the evaluator identifies the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12]

[5] In the interim, appellant submitted a claim for compensation and evidence regarding his attempts to return to work at the employing establishment. He did not submit an additional impairment evaluation. An employing establishment notice of personnel action indicated that appellant was separated due to inability to perform the duties of his position effective May 31, 2009.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a).

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

[10] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at 494-531.

[12] *Id*. at 521.

Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[13]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[14] 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 schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[15]

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.[16] 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 a July/August 2009 *The Guides Newsletter*.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he sustained ratable impairment of the left lower extremity. OWCP accepted that appellant sustained accepted cervical subluxation at C3 and C7, thoracic subluxation at T3 and T10, lumbar subluxation at L5 and a right shoulder contusion. Appellant filed a schedule award claim. The Board finds that the weight of the medial evidence rests with the opinion of Dr. Wendt, who provided a second opinion evaluation. Dr. Wendt was the only examining physician whose evaluation of permanent impairment fully comported with the complex requirements of the sixth edition of the A.M.A., *Guides*.

In a February 4, 2013 report, Dr. Wendt found that appellant's sensory and motor examinations in all extremities were normal. He diagnosed injury-related lumbar sprain, cervical strain and right elbow contusion, resolved, and cervical and lumbar degenerative disc disease that was preexisting and not injury related. Dr. Wendt advised that maximum medical improvement had been reached on January 26, 1999. Based on his examination, appellant had no neurologic deficit referable to a cervical or lumbar spinal nerve root and therefore no ratable limb. Dr. Sawyer, the medical adviser, concurred with Dr. Wendt's impairment analysis.

[13] *Id*. at 23-28.

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

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

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

[17] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

Appellant submitted an August 29, 2012 report from Dr. Hebrard who found that ankle dorsiflexion, inversion and eversion were 4+/5 on the left, which indicated that appellant had mild weaknesses in the L5 and S1 dermatomes. Dr. Hebrard stated that he rated the lower extremities in accordance with the July/August 2009 *The Guides Newsletter* and found that, due to a mild motor deficit of the left lower extremity based on L5, appellant had a class 1 impairment with a default grade C or five percent impairment. After applying the net adjustment formula, he concluded that appellant had seven percent impairment due to an L5 impairment. Dr. Hebrard further found that appellant had a mild motor deficit at the S1 level, for a class 1 impairment with a default grade of C for a four percent impairment. He then added the L5 and S1 values and concluded that appellant had a total 11 percent left lower extremity impairment. In a supplemental report dated December 12, 2012, Dr. Hebrard advised that appellant had severe stenosis at L5-S1 and reiterated his findings and conclusions.

Section 16.4a of the sixth edition of A.M.A., *Guides*, provides that motor deficit testing can be made by one or two observers, and if measurements are made by one examiner, they should be consistent on different occasions.[18] Dr. Hebrard provided only one measurement, where two are required. His evaluation, although rational, does not fully comport with the A.M.A., *Guides* and is therefore insufficient to establish a conflict in medical evidence or entitlement to a schedule award.

The Board notes that Dr. Wendt found appellant had preexisting degenerative disc disease. It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[19] Dr. Wendt stated that he did not have a peripheral nerve impairment of any lower extremity due to either the July 22, 1998 employment injury or a preexisting condition.

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 a permanent impairment of any extremity due to the accepted back conditions.

[18] A.M.A., *Guides*, *supra* note 3 at 533.

[19] *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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