United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 14-2015**
	)	**Issued: March 18, 2015**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND STATIONS, Philadelphia, PA, Employer	)	

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 18, 2014 appellant, through his representative, filed a timely appeal from a July 10, 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 this case.

ISSUE

The issue is whether appellant has established left lower extremity permanent impairment due to his work-related injuries.

FACTUAL HISTORY

This case has previously been before the Board. In an April 21, 2014 decision, the Board set aside OWCP's January 16, 2013 schedule award decision and remanded the case to refer

[1] 5 U.S.C. § 8101 *et seq.*

appellant to an appropriate medical specialist for examination and an opinion on permanent impairment. The findings and facts as set forth in the prior decisions are hereby incorporated by reference.[2]

In support of his schedule award claim, appellant submitted an April 9, 2013 medical report from Dr. David Weiss, a Doctor of Osteopathic Medicine. In his report, Dr. Weiss reported that appellant's January 10, 2002 work-related injury was the cause of the subjective and objective findings. He referred to Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, to determine class 1 moderate sensory deficit left L5 nerve root and calculated a net adjustment of five percent impairment.[3] Dr. Weiss then assigned class 1 moderate sensory deficit left S1 nerve root and calculated a net adjustment of three percent impairment.[4] Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] he combined the two values to determine that appellant was entitled to eight percent impairment of the left lower extremity.

On June 14, 2013 OWCP referred the case file, statement of accepted facts, and Dr. Weiss' April 9, 2013 report to Dr. Morley Slutsky, Board-certified in occupational medicine, serving as OWCP district medical adviser (DMA) to review the records and provide an opinion regarding permanent functional loss of the affected lower extremity.

In a June 13, 2013 report, Dr. Slutsky found no ratable deficits and no lower extremity impairments secondary to the accepted conditions. He noted that an impairment rating was performed by Dr. Weiss on February 29, 2012 which found sensory deficits in the L3 and L4 distribution and assigned ratings based upon those issues. Appellant was reevaluated by Dr. Weiss on April 9, 2013, at which time the examination revealed decreased sensation in the L5 and S1 dermatomes and normal lower extremity motor strength. Dr. Slutsky noted that Dr. Weiss' clinical findings were considerably different than the majority of physicians who evaluated appellant since 2002, who found no significant sensory, motor, or reflex changes in the lower extremities. Additionally, appellant had undergone diagnostic testing, which included lumbar magnetic resonance imaging (MRI) scans and computerized tomography (CT) scans, the results of which were not consistent with involvement of nerve roots at the L5-S1 levels. Dr. Slutsky found that Dr. Weiss' findings were inconsistent and could not be explained by diagnostic testing. He further found that there were no reliable or valid, ratable lower extremity deficits upon which to base impairment calculations. Dr. Slutsky noted that, while appellant's tests supported left sided L2 involvement, neither the A.M.A., *Guides* nor *The Guides Newsletter*

[2] Docket No. 13-2124 (issued April 21, 2014). On January 10, 2002 appellant, then a 43-year-old heavy mobile equipment mechanic filed a traumatic injury claim alleging that he sustained a back injury when lifting and turning a rim from a crane tire weighing approximately 300 pounds. By decision dated March 22, 2002, OWCP accepted the claim for lumbosacral strain. It subsequently expanded the acceptance to include displacement of lumbosacral disc without myelopathy.

[3] Table 2, *The Guides Newsletter*, (6th ed. July/August 2009).

[4] *Id.*

[5] A.M.A., *Guides* (2009).

allowed for ratings of this nerve root and that there were no clinical findings in the lower extremities to support deficits at this level.

By decision dated July 16, 2013, OWCP affirmed the June 3, 2013 decision finding that the evidence failed to establish a permanent impairment to a member or function of the body. It noted that the weight of medical opinion rested with the report of Dr. Slutsky serving as OWCP DMA.

As previously noted, by decision dated April 21, 2014, the Board set aside OWCP's July 16, 2013 decision and remanded the case to refer appellant to an appropriate medical specialist for examination and opinion on permanent impairment.

On June 13, 2014 OWCP referred appellant, a statement of accepted facts, and the case file to Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding permanent impairment of the lower extremities.

In a June 18, 2014 medical report, Dr. Somogyi documented a history of the employment incident, reviewed prior medical and diagnostic reports, and provided findings on physical examination. He reported that appellant rated his pain level from 0 (no pain) to 10 (excruciating pain) at 3 to 4. Regional examination revealed no gross deformity or obvious abnormality. Range of motion of the lumbosacral segment revealed forward flexion performed to mid tibia level with pain, extension was 20 degrees and painful, lateral flexion was 30 degrees bilaterally with minimal discomfort, and rotation movements were full and painless. Dr. Somogyi noted no range of motion limitation of the upper or lower extremities and no palpatory findings. He noted that objective findings also were negative. He stated that the Spurling test was negative, straight leg raising examination was bilaterally negative, Homan's sign and Febere's tests were unrevealing, and no abnormal reflex patterns were identified. With respect to neurological examination, Dr. Somogyi stated that motor, sensory, and deep tendon reflexes were normal.

Dr. Somogyi opined that maximum medical improvement (MMI) was reached on June 1, 2004 based on the date of examination by Dr. Joel N. Abramovitz, a Board-certified neurosurgeon. He noted that appellant's objective complaints were related to lower back pain and accentuated by range of motion maneuvers and prolonged sitting. The diagnostic entities included history of lumbosacral sprain and strain, status post previous hemilaminectomy and discectomy of the lumbar spine, and chronic lower back syndrome. As such, appellant's diagnosis was related to low back impairment. Dr. Somogyi stated that no definite impairment related to the lower extremity was identified. Based on the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, he opined that there was no evidence of spinal nerve extremity impairment and no impairment related to the affected extremities.[6]

OWCP routed Dr. Somogyi's report and the case file to Dr. Slutsky, serving as the DMA, for review and a determination on whether appellant sustained a permanent partial impairment of the lower extremities and on the date of MMI.

[6] *Supra* notes 3 and 5.

In a June 26, 2014 report, Dr. Slutsky opined that, based on the A.M.A., *Guides* and *The Guides Newsletter*, there was no basis for a lower extremity impairment related to the accepted low back conditions.[7] He noted review of Dr. Somogyi's June 13, 2014 second opinion examination who also found no lower extremity sensory, motor, or reflex deficits related to the lumbar spine.

The DMA noted that Dr. Weiss' February 29, 2012 examination found sensory deficits in the L3 and L4 distribution and assigned ratings based upon those issues. Appellant was reevaluated by Dr. Weiss on April 9, 2013. The examination revealed decreased sensation in the L5 and S1 dermatomes and normal lower extremity motor strength. Dr. Slutsky repeated his assertion that Dr. Weiss' clinical findings were considerably different than the majority of physicians who had evaluated appellant since 2002 and found no significant sensory, motor, or reflex changes in the lower extremities. Additionally, appellant had undergone diagnostic testing including lumbar MRI and CT scans, the results of which were not consistent with involvement of nerve roots at the L5-S1 levels. Dr. Slutsky noted that electromyogram (EMG) testing also demonstrated no evidence of lower extremity radiculopathy. He concluded that there were no reliable or valid, ratable lower extremity deficits upon which to base impairment calculations.

By decision dated July 10, 2014, OWCP denied appellant's claim for a schedule award finding that the evidence failed to establish a permanent impairment to a member or function of the body.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.[8] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (6th ed. 2009) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[10] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so

[7] *Id.*

[8] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[9] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[10] *Tammy L. Meehan*, 53 ECAB 229 (2001).

that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[11]

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.[12] 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.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[14] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the edition July/August 2009 edition is to be applied.[15] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[16]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[17] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[18]

ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain and displacement of lumbosacral disc without myelopathy. The issue is whether appellant sustained a permanent impairment as a result of his employment-related work injuries. The Board finds that he has not submitted sufficient evidence to establish that, as a result of his employment injury, he sustained

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013).

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

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

[14] *Supra* note 12. FECA Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[15] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *id*. at Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[16] Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.808.5c(3).

[17] A.M.A., *Guides* 533.

[18] *Id.* at 521.

any permanent impairment to a scheduled member such that he would be entitled to a schedule award.[19]

The Board previously remanded this case specifically to obtain a second opinion as to whether appellant had a peripheral nerve impairment of the lower extremities which originated from the accepted lumbar injury. On remand, OWCP referred appellant to Dr. Somogyi for a second opinion examination regarding the nature and extent of his injuries and a determination on whether appellant sustained a permanent partial impairment of the lower extremities.

In the June 18, 2014 medical report, Dr. Somogyi documented a history of the employment incident, reviewed prior medical and diagnostic reports, and provided findings on physical examination. He noted no range of motion limitation of the upper or lower extremities and no palpatory findings. Dr. Somogyi further stated that objective findings also were negative. He explained that the Spurling test was negative, straight leg raising examination was bilaterally negative, Homan's sign and Febere's tests were unrevealing, and no abnormal reflex patterns were identified. With respect to the neurological examination, Dr. Somogyi stated that motor, sensory, and deep tendon reflexes were normal. Using objective examination findings, review of diagnostic studies, and appellant's subjective complaints, Dr. Somogyi stated that no definite impairment related to the lower extremity was identified. Based on the sixth edition of the A.M.A., *Guides*, Dr. Somogyi opined that there was no evidence of spinal nerve extremity impairment and no impairment related to the affected extremities.[20] He concluded that MMI was reached on June 1, 2004. The Board finds that the report of Dr. Somogyi was thorough and well rationalized.

Dr. Slutsky, serving as the DMA, reviewed Dr. Somogyi's report and agreed that there was no basis for a lower extremity impairment related to the accepted low back conditions. He noted that Dr. Somogyi's examination also found no lower extremity sensory, motor, or reflex deficits related to the lumbar spine. This supported Dr. Slutsky's prior assertion that Dr. Weiss' clinical findings were considerably different than the majority of physicians who evaluated appellant since 2002 who found no significant sensory, motor, or reflex changes in the lower extremities. Additionally, appellant had undergone diagnostic testing including lumbar MRI and CT scans, the results of which were not consistent with involvement of nerve roots at the L5-S1 levels. Dr. Slutsky noted that EMG testing also demonstrated no evidence of lower extremity radiculopathy. He concluded that there were no reliable or valid, ratable lower extremity deficits upon which to base impairment calculations in accordance with the A.M.A., *Guides*.[21]

The Board finds that appellant has failed to establish a compensable permanent impairment of the lower extremities. Dr. Slutsky reviewed appellant's history of injury, the medical record, and the statement of accepted facts. Utilizing Dr. Somogyi's most recent June 13, 2014 examination, a history of injury, and review of the diagnostic testing, he found no impairment related to the lower extremities. The DMA provided support for his argument

[19] *W.R.*, Docket No. 13-492 (issued June 26, 2013).

[20] *Supra* note 6.

[21] *Id.*

stating that Dr. Somogyi's examination revealed no lower extremity sensory, motor, or reflex deficits related to the lumbar spine. As previously noted, FECA does not allow for permanent impairment ratings of the back without evidence of extremity impairment.[22] The reports of Dr. Somogyi and Dr. Slutsky establish that appellant had no impairment of the left lower extremity. Thus, the Board finds that OWCP properly denied appellant's claim for a schedule award.[23]

On appeal, counsel for appellant argues that Dr. Somogyi failed to provide a rationalized opinion that appellant did not sustain any impairment related to his accepted injuries. The Board notes that any lack of explanation that may exist in the second opinion report was cured by Dr. Slutsky who thoroughly reviewed the medical record and examination findings and provided medical rationale that appellant had no impairment related to the lower extremities. The Board also rejects counsel's argument that the second opinion report is deficient because Dr. Somogyi did not conduct a Semmes-Weinstein monofilament test.[24] The Board notes that Dr. Somogyi's examination findings and diagnostic testing provided no evidence for lower extremity impairment. Moreover, Dr. Slutsky reviewed the Semmes-Weinstein monofilament test findings provided in Dr. Weiss' report, as well as the medical evidence of record and Dr. Somogyi's examination, to determine that appellant did not sustain any impairment to the lower extremity.

Counsel for appellant further argues that, at the very least, there is a conflict in medical evidence because Dr. Weiss provided a well-reasoned opinion for eight percent impairment of the left lower extremity. The Board is not persuaded by this argument. While Dr. Weiss made proper reference to the A.M.A., *Guides* when calculating appellant's left lower extremity impairment, his opinion is not supported by the medical evidence of record or the most recent physical examination findings on June 13, 2014.[25]

It is appellant's burden of proof to establish a permanent impairment of a scheduled member as a result of an employment injury.[26] He has not met his burden of proof and thus OWCP properly denied his schedule award claim.[27]

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.

---

[22] *Supra* note 16.

[23] *M.J.*, Docket No. 13-598 (issued May 8, 2013).

[24] *E.W.*, Docket No. 12-772 (issued June 13, 2013) (appellant's attending physician disputed the findings of OWCP's impartial medical examiner (IME) arguing that the IME failed to conduct the Semmes-Weinstein monofilament test. The Board found that appellant failed to establish any impairment to the left lower extremity and the weight of the medical evidence rested with the referee physician). *See also F.L.*, Docket No. 10-1125 (issued December 21, 2010).

[25] *E.J.*, Docket No. 12-1948 (issued June 5, 2013).

[26] *See supra* note 10.

[27] *L.F.*, Docket No. 10-343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

CONCLUSION

The Board finds that appellant has not established a left lower extremity permanent impairment, due to his employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 10, 2014 is affirmed.

Issued: March 18, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board