United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 15-179**
	)	**Issued: March 24, 2015**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Fort Worth, TX, 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 November 3, 2014 appellant filed a timely appeal from a July 23, 2014 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 more than one percent permanent impairment of his left leg for which he received a schedule award.

FACTUAL HISTORY

On October 3, 2013 appellant, then a 37-year-old cook supervisor, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2013 he was moving trays from the rack to the serving line when he felt a sudden onset of pain in his lower back, causing him to fall to the

[1] 5 U.S.C. § 8101 *et seq.*

ground. He complained of lower back pain with numbness, and tingling radiating into his legs and feet.

By decision dated December 2, 2013, OWCP accepted the claim for herniated lumbar disc at L4-5. The claim was later expanded to include displacement of lumbar intervertebral disc without myelopathy.

Appellant sought treatment with various providers and was referred to Dr. Jack M. Klem, a Board-certified neurosurgeon, for a neurological consultation pertaining to his work-related injury.

On March 3, 2014 appellant underwent a left lateral L4-5 discectomy and decompressive foraminotomy to decompress the left L4 and L5 nerve roots. Dr. Klem noted the pre- and postoperative diagnosis as left L4 and L5 radiculopathy with motor weakness secondary to left lateral L4-5 disc herniations. The surgery was approved by OWCP.

On April 27, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated May 13, 2013, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). It provided him 30 days to submit the requested impairment evaluation.

In a June 17, 2014 report, Dr. Klem reported that appellant had done well postoperatively with resolution of his lower back pain and radiculopathy. He noted some residual numbness to the distal left lower extremity. Dr. Klem provided findings on physical examination which revealed full strength movement of all extremities, well-healed lumbar incision, stable and steady gait, no observable discomfort upon standing from a sitting position or with ambulation, and some residual numbness to the distal left lower extremity. He diagnosed post-left lateral L4-5 discectomy with resolution of lower back pain and radiculopathy. Dr. Klem opined that appellant had reached maximum medical improvement (MMI) and had 12 percent impairment given his slight residual numbness. He noted that appellant's impairment had been greater prior to surgery given the motor weakness to his left foot, which had since improved to symmetrical strength. Dr. Klem stated that, because the surgical intervention decompressed the affected nerve root which was causing the sensory and motor changes, appellant only had a slight residual sensory deficit which accounted for his remaining impairment.

OWCP properly routed Dr. Klem's report and the case file to Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination on whether appellant sustained a permanent partial impairment of the left lower extremity and date of MMI.

In a July 3, 2014 report, Dr. Dyer reported that appellant reached MMI on June 17, 2014, the date of Dr. Klem's examination. The DMA noted that, beginning November 1, 2013, appellant had chronic lower back pain with radiation to the left knee and right thigh. The pain was described as numbness and stabbing, which increased with lifting trays of mail and prolonged standing and sitting. Dr. Dyer disagreed with Dr. Klem's 12 percent left lower extremity impairment rating, stating that he did not properly utilize the A.M.A., *Guides* for

impairment due to left L4 slight or mild residual numbness of the left leg. He stated that Dr. Klem probably used the A.M.A., *Guides* peripheral nerve impairment grids when calculating his impairment rating rather than the mandated use of *The Guides Newsletter* for spinal nerve root extremity impairment of the left L4 root.[2] Dr. Dyer referred to Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, to determine class 1 grade C severity of left L4 mild sensory deficit resulting in a schedule award for one percent impairment of the left lower extremity.[3]

By decision dated July 23, 2014, OWCP granted appellant a schedule award claim for one percent permanent impairment of the left leg. It found that the weight of the medical evidence rested with Dr. Dyer serving as OWCP's DMA. The date of MMI was noted as June 17, 2014, the date of Dr. Klem's examination. The award covered a period of 2.88 weeks from June 17 to July 7, 2014.

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.[4] 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.[5]

It is the claimant's burden to establish that he has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[6] 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 maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[7]

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

[3] *Id.* at page 6, Table 2.

[4] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[5] *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).

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

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

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.[8] 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.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[10] 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 sixth edition (July/August 2009) is to be applied.[11] FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[12]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[13] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[14]

ANALYSIS

OWCP accepted appellant's claim for herniated lumbar disc at L4-5 and displacement of lumbar intervertebral disc without myelopathy. On March 3, 2014 appellant underwent a left lateral L4-5 discectomy and decompressive foraminotomy. The Board notes that a schedule award is not payable under FECA for injury to the spine[15] or based on whole person impairment.[16] However, a claimant may be entitled to a schedule award for permanent

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

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

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[11] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also id*. at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[12] *Supra* note 7 at 2.808.5c(3).

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

[14] *Id.* at 521.

[15] *Supra* note 8.

[16] *N.M.*, 58 ECAB 273 (2007).

impairment to an extremity even though the cause of the impairment originated in the spine.[17] The issue is whether appellant has more than one percent permanent impairment of the left lower extremity for which he received a schedule award. The Board finds that he has not met his burden of proof to establish that he has impairment of the left lower extremity greater than the one percent already awarded.[18]

In a June 17, 2014 report, Dr. Klem diagnosed post-left lateral L4-5 discectomy with resolution of lower back pain and radiculopathy. He provided findings on physical examination which revealed full strength movement of all extremities, well-healed lumbar incision, stable and steady gait, no observable discomfort upon standing from a sitting position or with ambulation, and some residual numbness to the distal left lower extremity. Dr. Klem opined that appellant had 12 percent impairment given his slight residual numbness and had reached MMI. He noted that appellant's impairment was much greater prior to surgery given the motor weakness to his left foot which had since improved to symmetrical strength. Dr. Klem explained that because the surgical intervention decompressed the affected nerve root which was causing the sensory and motor changes, appellant only had a slight residual sensory deficit which accounted for his remaining impairment.

Dr. Dyer, serving as OWCP's DMA, reviewed Dr. Klem's report and disagreed with his 12 percent impairment rating, stating that he did not properly utilize the A.M.A., *Guides* for impairment due to left L4 slight or mild residual numbness of the left leg. He stated that Dr. Klem probably used the A.M.A., *Guides* peripheral nerve impairment grids rather than the mandated *The Guides Newsletter* for spinal nerve root extremity impairment of the left L4 root.[19] Dr. Dyer referred to Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, to determine class 1 grade C severity of left L4 mild sensory deficit resulting in a schedule award for one percent impairment of the left lower extremity.[20]

The Board finds that the opinion of Dr. Dyer is thorough and well rationalized.[21] Dr. Dyer utilized the case record and Dr. Klem's June 17, 2014 examination to find one percent impairment of the left lower extremity. The DMA did not disagree with Dr. Klem's findings and examination pertaining to appellant's status post-left lateral L4-5 discectomy such that a conflict in medical evidence was created.[22] Rather he disagreed with Dr. Klem's use of the A.M.A., *Guides* and properly explained that, in accordance with OWCP procedures, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, must be utilized to determine appellant's nerve impairment to the left lower extremity resulting from the spinal injury.[23] Using Table 2 of

[17] *Supra* note 9.

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

[19] *Supra* note 2.

[20] *Supra* note 3.

[21] *Supra* note 18.

[22] *See J.J.*, Docket No. 14-1143 (issued December 10, 2014); *Mary L. Henninger*, 52 ECAB 408 (2001).

[23] *Supra* note 11.

The Guides Newsletter, Dr. Dyer properly determined class 1 grade C severity of left L4 mild sensory deficit resulting in a schedule award for one percent impairment of the left lower extremity.[24]

The Board notes that Dr. Klem's report is not sufficient to establish that appellant has more than one percent permanent impairment of the lower left extremity. While the treating surgeon provided a 12 percent impairment rating, he did not indicate use of the A.M.A., *Guides* in accordance with the schedule award provision of FECA. Moreover, Dr. Klem failed to provide any explanation as to how he arrived at a 12 percent impairment rating and did not reference any specific sections, pages, or tables of the A.M.A., *Guides* or *The Guides Newsletter*. Board precedent is well settled that when an attending physician's report gives an estimate of impairment but does not address how the estimate is based upon the A.M.A., *Guides*, OWCP may follow the advice of its DMA where he or she has properly applied the A.M.A., *Guides*.[25] Thus, Dr. Klem's rating is not sufficient to establish that appellant has more than one percent permanent impairment of the left leg for which he was granted a schedule award.[26]

Accordingly, the Board finds Dr. Dyer correctly applied the A.M.A., *Guides* and *The Guides Newsletter* to find that appellant had one percent permanent impairment of the left leg, for which he had received a schedule award.[27] Appellant has not submitted sufficient evidence to establish that he has more than one percent impairment to the left lower extremity.

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 that he has more than one percent permanent impairment of the left lower extremity for which he received a schedule award.

[24] *Supra* note 3.

[25] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[26] *C.S.*, Docket No. 08-1466 (issued December 1, 2008).

[27] *Y.K.*, Docket No. 11-1623 (issued June 25, 2012).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 23, 2014 is affirmed.

Issued: March 24, 2015
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