

**United States Department of Labor
Employees' Compensation Appeals Board**

G.B., Appellant)
and) Docket No. 15-445
U.S. POSTAL SERVICE, POST OFFICE,) Issued: May 4, 2015
Oklahoma City, OK, Employer)

)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 17, 2014 appellant filed a timely appeal from a December 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 that he sustained more than 31 percent permanent impairment to his right lower extremity and more than 31 percent impairment to his left lower extremity, for which he received schedule awards.

On appeal, appellant takes issue with the date of maximum medical improvement.

¹ 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

This case was previously before the Board. By decision dated May 18, 2009, the Board set aside OWCP's February 11 and August 1, 2008 decisions, which denied appellant's requests for review of the written record and for reconsideration, respectively, based on the premise that he was seeking review of its September 17, 2003 decision, the Board remanded the case to OWCP for further proceedings consistent with the Board's decision and order.² The facts and findings contained in the Board's prior decision are incorporated herein by reference. The facts germane to the present appeal are set forth below.

By decision dated September 27, 2002, OWCP awarded appellant 14 percent impairment for loss of use of the right lower extremity. The award ran for 40.32 weeks for the period March 28, 2002 to January 4, 2003. Appellant retired on disability from the employing establishment on August 25, 2006.

Appellant filed a claim for an increased schedule award.

By decision dated November 21, 2013, OWCP denied appellant's claim as the medical evidence was insufficient to establish permanent impairment to a scheduled member due to the accepted work injury.

Appellant requested reconsideration and submitted additional medical evidence. Evidence pertinent to impairment included the February 20, 2014 report of Dr. John Ellis, a Board-certified family practitioner, who noted the history of injury and appellant's complaints, reviewed medical records, and set forth examination findings. Diagnoses due to work injury included muscle tendon unit strain of back, deranged discs in the back, fusions at multiple disc levels from L2 through S1, and bilateral L3, L4, L5, and S1 spinal nerve impairment. Dr. Ellis opined that appellant reached maximum medical improvement on February 20, 2014. He noted that appellant was temporarily totally disabled since June 15, 2006 and was now permanently and totally disabled as a result of his work injury. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter the A.M.A., *Guides*), Dr. Ellis found for the right lower extremity, appellant had 4 percent L3 spinal nerve impairment; 6 percent L4 spinal nerve impairment; 11 percent L5 spinal nerve impairment; and 14 percent S1 spinal nerve impairment, for 35 percent total impairment. Under Table 15-20, page 434, the total combined permanent impairment of the right lower extremity was 31 percent. For the left lower extremity, Dr. Ellis found appellant had 4 percent L3 spinal nerve impairment; 6 percent L4 spinal nerve impairment; 11 percent L5 spinal nerve impairment; and 14 percent S1 spinal nerve impairment, for 35 percent total impairment. Under Table 15-20, page 434, the total combined permanent impairment of the left lower extremity was 31 percent.

² Docket No. 08-2253 (issued May 18, 2009). Appellant's May 4, 2000 occupational disease claim was accepted for aggravation of spinal stenosis, lumbar region; and degeneration of lumbar or lumbosacral intervertebral disc. OWCP authorized multiple surgical procedures of the lumbar spine. By decision dated August 21, 2009, OWCP accepted appellant's recurrence of July 19, 2006.

³ A.M.A., *Guides* (6th ed. 2008).

In June 11 and September 24, 2014 reports, Dr. Ronald Blum, an OWCP medical adviser, reviewed the statement of accepted facts and the medical evidence of record, including Dr. Ellis' February 20, 2014 report. Based on Dr. Ellis' findings, Dr. Blum found appellant had 31 percent impairment for the right lower extremity and 31 percent impairment for the left lower extremity. Utilizing *The Guides Newsletter*, proposed Table 2, class 1 impairment for each of the extremities was calculated as follows: For L3 nerve impairment, mild sensory deficit, grade C, was one percent and mild motor deficit, grade C was three percent, for combined four percent impairment. For L4, mild sensory deficit, grade C, was one percent, for mild motor deficit, grade C, was five percent, for combined six percent. For L5, moderate sensory deficit, grade D, was 4 percent; mild motor deficit, grade D, was 7 percent; for combined 11 percent. For S1, severe sensory deficit, grade E, was 4 percent, and moderate motor deficit, grade E, was 10 percent, for combined 14 percent. The total combined in accordance with page 604 of A.M.A., *Guides* was 31 percent ($4 + 6 + 11 + 14$). Dr. Blum found that since appellant previously received 14 percent permanent impairment for the right lower extremity based on motor and sensory deficits in the L4-S1 nerve root, that amount should be subtracted from the current determination (31-14) to yield 17 percent additional impairment for the right lower extremity. In a September 24, 2014 report, he found maximum medical improvement was achieved on February 20, 2014, the date of Dr. Ellis' evaluation.

By decision dated October 20, 2014, OWCP vacated the November 21, 2013 decision as it found that appellant provided a new impairment rating dated February 20, 2014 by Dr. Ellis which demonstrated a higher percentage of impairment than previously awarded.

By decision dated December 10, 2014, OWCP awarded appellant 17 percent left lower extremity and 31 percent right lower extremity impairment.⁴ The date of maximum medical improvement was February 20, 2014 and the period of award ran 138.24 weeks from February 20, 2014 to October 14, 2016.

On appeal, appellant contests the date of maximum medical improvement, noting it should be earlier.

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.⁵ 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

⁴ This appears to be typographical error as it should have read 17 percent right lower extremity and 31 percent left lower extremity impairment.

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

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to his employment injury.⁷ Moreover, OWCP procedures provide that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.⁸

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). For upper and lower extremity impairments, the evaluator identifies the impairment class for the Class of Diagnosis condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.⁹ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

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.¹¹ 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.¹²

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.¹³ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in

⁶ *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).

⁷ *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002).

⁹ *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

¹⁰ *J.W.*, Docket No. 11-289 (issued September 12, 2011).

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *Rozella L. Skinner*, 37 ECAB 398 (1986).

section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.¹⁴

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹⁵

OWCP procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.¹⁶

ANALYSIS

OWCP accepted that appellant sustained work-related aggravation of lumbar spinal stenosis and degeneration of lumbar intervertebral disc and authorized several surgical procedures of the lumbar spine. By decision dated September 27, 2002, it awarded appellant 14 percent permanent impairment of the right lower extremity. Appellant requested an increased schedule award based on medical evidence from Dr. Ellis dated February 20, 2014 showing progression of his employment-related condition resulting in increased impairment. By decision dated December 10, 2014, OWCP awarded 17 percent left lower extremity impairment and 31 percent right lower extremity impairment. As previously noted, a typographical error occurred as the award should reflect 17 percent right lower extremity impairment and 31 percent left lower extremity impairment.¹⁷ The period of the award ran for 138.24 weeks from the date of maximum medical improvement of February 20, 2014.

In his February 20, 2014 report, Dr. Ellis opined that appellant achieved maximum medical improvement on February 20, 2014. He also noted that appellant had 31 percent right lower extremity impairment and 31 percent left lower extremity impairment. While Dr. Ellis noted impairment percentages due to spinal nerves at L3, L4, L6, and S1, he did not specify how he arrived at his calculations or cite to the appropriate sections in the A.M.A., *Guides*. Thus, his report is of limited probative value.

The Board finds that OWCP properly determined appellant's permanent impairment rating based upon the reports of Dr. Ellis and Dr. Blum, the medical adviser, who properly applied the appropriate portions of the A.M.A., *Guides* and *The Guides Newsletter* to Dr. Ellis' clinical findings in determining the bilateral 31 percent lower extremity impairments.¹⁸

¹⁴ 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.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *see also* L.R., Docket No. 14-674 (issued August 13, 2014); D.H., Docket No. 12-1857 (issued February 26, 2013).

¹⁶ Federal (FECA) Procedure Manual, *Id.* at Chapter 2.808.7.a(1) (February 2013).

¹⁷ *See supra* note 5.

¹⁸ *See supra* note 8 at Chapter 2.810.8(j) (January 2010).

Dr. Blum used Dr. Ellis' examination findings in conjunction with Proposed Table 2 of the *The Guides Newsletter* and found appellant had 31 percent right lower extremity impairment and 31 percent left lower extremity impairment. He provided detailed explanations and calculations for each nerve impairment and explained how and why the impairments to each nerve root were proportioned for sensory deficits and motor deficits. For L3 nerve impairment, this amounted to mild sensory deficit one percent and mild motor deficit three percent, for a combined four percent impairment under A.M.A., *Guides* page 604. For L4 nerve impairment, this amounted to mild sensory deficit one percent and mild motor deficit five percent, for combined six percent. For L5 nerve impairment, this amounted to moderate sensory deficit four percent and mild motor deficit seven percent. While Dr. Blum found this equated to a totaled 11 percent impairment, proper combination under page 604 equates to 9 percent impairment.¹⁹ For S1 nerve impairment, this amounted to severe sensory deficit 4 percent and moderate motor deficit 10 percent. While Dr. Blum found a combined value of 14 percent, proper calculation under page 604 amounts to 12 percent impairment. The total combined impairment of 4 plus 6 plus 9 plus 12 equals 31 percent. Therefore, Dr. Blum's erroneous calculations in utilizing the Combined Values Chart on page 604 are harmless error in light of the fact the total percentage remains 31 percent for each lower extremity. As appellant previously received 14 percent impairment to his right lower extremity, the medical adviser properly subtracted that amount from the current determination of 31 percent to yield 17 percent additional right lower extremity impairment. There is no other evidence demonstrating a higher percentage of impairment pursuant to the A.M.A., *Guides*. Therefore, OWCP properly issued the December 10, 2014 schedule award for 17 percent impairment of the right lower extremity and 31 percent impairment of the left lower extremity.

On appeal appellant contests the date of maximum medical improvement, noting it should be earlier. Maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Only when an impairment has reached maximum medical improvement can a permanent impairment rating be performed.²⁰ The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.²¹ In this case, both Dr. Ellis and Dr. Blum found that appellant reached maximum medical improvement on February 20, 2014. Furthermore since the record reflects appellant is not on OWCP continuing periodic compensation rolls, this date of maximum medical improvement is to his advantage as it reflects a higher pay rate, than would an earlier date.

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.

¹⁹ *The Guides Newsletter* at page 3 states that motor and sensory impairments are to be combined.

²⁰ See A.M.A., *Guides* 26; Patricia J. Penney-Guzman, 55 ECAB 757 (2004).

²¹ Albert Valverde, 36 ECAB 233, 237 (1984).

CONCLUSION

The Board finds that appellant did not sustain greater than 31 percent permanent impairment to the right lower extremity and 31 percent permanent impairment to the left lower extremity, for which he received a schedule award.

ORDER

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

Issued: May 4, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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