United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 15-1312**
	)	**Issued: October 6, 2015**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, 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 May 26, 2015 appellant filed a timely appeal from a March 24, 2015 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.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish that he has permanent impairment caused by his accepted employment injuries which would entitle him to a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Subsequent to his appeal, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).

FACTUAL HISTORY

On August 20, 2009 appellant, then a 53-year-old sheet metal mechanic, injured his lower back while lifting, bending, and pulling form blocks and pieces of heavy rubber while operating a fluid cell machine at work. He stopped work on August 24, 2009 and returned on August 25, 2009. OWCP accepted the claim for a lumbar sprain and displacement of lumbar intervertebral disc without myelopathy.

Initial medical reports diagnosed a lumbosacral strain. A January 13, 2012 magnetic resonance imaging (MRI) scan showed a small bulge at L5-S1, superimposed on a grade one degenerative anterolisthesis, causing mild central canal stenosis. At L3-4 and L4-5, there were small bulges with the foramina uncompromised. In a February 28, 2012 report, Dr. Scott Mitchell, a Board-certified pain management specialist, found leg strength was 5/5 bilaterally. He related that appellant denied sensation to light touch throughout the lower extremities. Dr. Mitchell diagnosed lumbar disc displacement.[3]

On April 11, 2013 appellant filed a Form CA-7 claim for a schedule award. With his request, he submitted a March 19, 2013 report from Dr. John W. Ellis, Board-certified in family medicine, who noted appellant's history and examined him. Dr. Ellis used the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (A.M.A., *Guides*) and provided findings which included that he had tenderness and tightness of the thoracic and lumbar paraspinous muscles and decreased motion of the back. He noted that appellant had difficulty getting his shoes on and off. Dr. Ellis found that there was decreased sensation on the dorsal and lateral aspects of both feet and weakness on dorsiflexion of the big toes, plantar flexion of the feet, and toe and heel walking, with straight leg raising positive bilaterally. He indicated that reflexes were 2+ and equal in the biceps, 1+ and equal in the wrists, 1+ and diminished in the right ankle and 0 to 1+ and diminished in the left ankle. Dr. Ellis advised that appellant was alert, oriented and cooperative with no evidence of symptom magnification or malingering. He referred to Table 16-12, page 533 and the July/August 2009 *The Guides Newsletter*, rating spinal nerves to the extremity. Dr. Ellis allotted 11 percent for L5 spinal nerve root impairment and 7 percent for S1 spinal nerve root impairment. He opined that appellant had 17 percent impairment to both the right and the left legs. Dr. Ellis indicated that appellant retired on July 1, 2012.

On May 2, 2013 an OWCP medical adviser reviewed the medical records and determined that there was a significant variance of information with respect to the neurological impairment of the lower extremities that could not be resolved on the basis of a medical records review. He explained that Dr. Ellis found moderate sensory loss and mild motor loss involving the L5 and S1 spinal nerves bilaterally, while other medical examinations did not. The medical adviser referred to the report of Dr. Mitchell, who on December 11, 2012 found leg strength was 5/5 bilaterally and appellant denied loss of sensation to light touch throughout the legs.

[3] In a May 1, 2012 second opinion examination report, Dr. Dennis E. Foster, a Board-certified orthopedic surgeon, opined that the work injury also caused moderate to severe spondylosis. Examination showed normal strength in all muscle groups of both legs and negative straight leg raising.

On February 5, 2015 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions, and the medical record to Dr. Michael Shawn Smith, Board-certified in physical medicine and rehabilitation.

In a February 25, 2015 report, Dr. Smith noted appellant's history of injury and examined him. His findings included that appellant had good forward flexion and could come within touching his toes by six inches to about 80 degrees. Extension was limited to 5 to 10 degrees and lateral bending was limited to 10 to 15 degrees. Dr. Smith determined that appellant had more limitation on the right compared to the left and that extension and rotation did not result in lower back discomfort. Appellant had some paraspinal spasms and mild kyphosis in the thoracic segments. He had good upper body strength and lower body strength of 5/5 throughout with hip flexion and extension, knee flexion and extension and hip abduction and adduction. Extensor hallucis longus strength was also 5/5. Sensation was intact to light touch and painful stimuli with pulling on hairs of the lower extremities. There was no atrophy. Appellant ambulated without an assisted device and his straight leg raising was negative bilaterally.

Dr. Smith diagnosed multilevel lumbar disc disease with biomechanical pain and spinal stenosis without radiculopathy and cervical lumbar degenerative disc disease. He utilized the A.M.A., *Guides* (6th ed. 2008) and determined that there were no sensory or motor deficits noted in the bilateral lower extremities, and the lower extremity rating was therefore zero percent pursuant to the A.M.A., *Guides*. Dr. Smith explained that regarding spinal stenosis, the A.M.A., *Guides* did not recognize the impairment rating for extremities but noted that the July/August 2009 *The Guides Newsletter* provided an alternative rating system for spinal and nerve extremity impairment. He advised that impairment was based on nerve impairment in the extremities. Dr. Smith explained that appellant had no peripheral spinal nerve dermatomal weakness or numbness although he clearly had symptoms of spinal stenosis. He concluded that he could find no impairment for spinal nerve impairment with motor or sensory loss based on his current examination. Dr. Smith explained that despite having classic spinal stenosis symptoms it was not a basis for an impairment rating.

On March 17, 2015 an OWCP medical adviser reviewed the medical record and determined that appellant's accepted conditions included lumbar sprain and displacement of lumbar IV disc. He noted that appellant reached maximum medical improvement on February 24, 2015, the date of Dr. Smith's evaluation. The medical adviser noted that Dr. Smith determined that appellant had no peripheral spinal nerve dermatomal weakness or numbness although he clearly had symptoms of spinal stenosis. He related that Dr. Smith found no impairment for spinal nerve impairment with motor or sensory loss based upon his examination. The medical adviser agreed that appellant had zero percent impairment of the right and left lower extremities.

By decision dated March 24, 2015, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not support a permanent impairment to a scheduled member or function of the body.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[4] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides.*[7]

Although the A.M.A., *Guide*s 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 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 consistent with sixth edition methodology.[10] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[11]

ANALYSIS

The evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

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[4] 5 U.S.C. § 8107.

[5] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[6] 20 C.F.R. § 10.404.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

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

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

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

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

OWCP accepted appellant's claim for lumbar strain and displacement of lumbar disc without myelopathy. Appellant retired on July 1, 2012 and claimed a schedule award on April 11, 2013. However, he did not submit evidence from a physician finding that he had permanent impairment of a scheduled member, caused or aggravated by his accepted conditions, and which followed the A.M.A., *Guides* in rating permanent impairment. The Board notes that appellant submitted a March 19, 2013 report from Dr. Ellis, who referred to Table 16-12, page 533 and the July/August 2009 *The Guides Newsletter*, rating spinal nerves to the extremity. Dr. Ellis allotted 11 percent for L5 spinal nerve root impairment and 7 percent for S1 spinal nerve root impairment and opined that appellant had 17 percent impairment to both the right and the left lower extremity. However, he did not explain how he arrived at these values and his examination findings of sensory and motor loss are not consistent with findings of other physicians which found no such deficits. Without further explanation or rationale regarding this disparity, Dr. Ellis' report is of limited probative value. Because of this inconsistency, OWCP's medical adviser recommended a second opinion examination.

In a February 25, 2015 report, Dr. Smith, the second opinion physician, noted appellant's history of injury and treatment and examined him. He utilized the A.M.A., *Guides* and determined that there were no sensory or motor deficits noted in the bilateral lower extremities, and explained that the lower extremity rating was therefore zero percent for the legs pursuant to the A.M.A., *Guides*. Dr. Smith indicated that, while appellant clearly had spinal stenosis, there was no basis under the A.M.A., *Guides* or *The Guides Newsletter* for rating impairment of the legs.

On March 17, 2015 OWCP medical adviser reviewed the medical records and confirmed that appellant had zero percent impairment of the right and left lower extremities.

Accordingly, the Board finds that appellant has not established entitlement to a schedule award.

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 met his burden of proof to establish that he has an impairment caused by his accepted employment injuries that would entitle him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 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