United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 14-0199**
	)	**Issued: September 16, 2015**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 4, 2013 appellant, through counsel, filed a timely appeal from a September 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).

[1] Alan J. Shapiro, Esq., filed the instant appeal on appellant's behalf on November 4, 2013. The application for review form (AB-1) contains appellant's signature designating him as the authorized representative. On November 18, 2013 he submitted a 22-page brief in support of the appeal. The Board notes that appellant subsequently submitted a letter to the Clerk of the Appellate Boards dated December 3, 2014, stating in part that "Attorney Tinkle still the attorney in this matter." On April 20, 2015 the Clerk of the Appellate Boards received from Marshall J. Tinkle, Esq. a 22-page brief dated November 27, 2013, which was nearly identical to the one previously submitted by Mr. Shapiro. Pursuant to the Board's *Rules of Procedure*, appellant can only have one duly authorized representative before the Board. Such representative will continue to be recognized unless the representative withdraws or abandons such capacity, or appellant directs otherwise. (*See* 20 C.F.R. § 501.9). As the instant appeal was filed by Mr. Shapiro, with appellant's signature designating him as the authorized representative, and appellant has not provided written direction removing Mr. Shapiro as his authorized representative, the Board will acknowledge him as appellant's representative in this appeal.

Pursuant to the Federal Employees' Compensation Act[2] (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 sustained any permanent impairment causally related to his accepted lumbar and thoracic conditions.

FACTUAL HISTORY

This case has been before the Board on prior appeal. The history of the case as set forth in the prior decision is incorporated herein by reference. The facts pertinent to this appeal will be summarized herein.

Appellant, a 46-year-old pipefitter helper, injured his back on January 21, 2004. He filed a claim for benefits on January 26, 2004, which OWCP accepted for lumbar and thoracic strain.

In a February 5, 2008 report, appellant's treating physician, Dr. Frank A. Graf, Board-certified in orthopedic surgery, reviewed the history of injury and noted that appellant had experienced mid-lower back pain which affected his performance at work. He stated that appellant had undergone a magnetic resonance imaging (MRI) scan of the thoracolumbar spine which documented a lumbar disc herniation at L4-5. Dr. Graf reported that, due to these conditions, he had assigned appellant to light duty. He stated that appellant had a lumbosacral spine rating of class 2 based on a disc herniation, single level, without surgery.

Dr. Graf determined that under Table 17-4 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*), appellant had a default value of 12 percent, whole person permanency, with a functional history adjustment grade modifier of 1; a physical examination grade modifier of 1; and a clinical studies grade modifier of 2. Dr. Graf assigned a 10 percent whole person permanent impairment or a 24 percent lower extremity impairment rating.

In a Form CA-7 dated June 25, 2008, appellant requested a schedule award.

In a July 30, 2008 report, Dr. David I. Krohn, a Board-certified internist and OWCP medical adviser, disagreed with Dr. Graf's interpretation of the May 5, 2004 MRI scan. He asserted that Dr. Graf had incorrectly interpreted the MRI scan to show a disc herniation, while the radiologist's report did not mention a herniated disc. Dr. Krohn found no documentation in the medical record or in Dr. Graf's examination to support that appellant had work-related impairment of either lower extremity. In the absence of medical evidence, there was no basis to grant a schedule award.

OWCP found a conflict in medical evidence between the opinions of Dr. Graf, appellant's treating physician, and Dr. Krohn, as to whether appellant had any permanent impairment. It referred appellant to Dr. Jonathan W. Sobel, a specialist in general surgery, for an

[2] 5 U.S.C. § 8101 *et seq.*

impartial medical examination to resolve the conflict. In a November 20, 2008 report, Dr. Sobel found that appellant had no ratable impairment of the lower extremities under either the fifth or sixth edition of the A.M.A., *Guides*. He noted that appellant's May 7, 2004 MRI scan showed mild degenerative disc disease in the lower lumbar spine and some minor disc bulging with narrowing at L4-5. Dr. Sobel ascribed this condition to age-appropriate degenerative disc disease with minor disc bulges and no evidence of disc herniation. He concluded that appellant had sustained an overuse sprain/strain of the lumbosacral spine on January 28, 2004. Dr. Sobel found no evidence in the medical record showing that appellant had sustained a herniated disc at any level in the lumbar spine causally related to his January 2004 work injury.

Based upon the report of Dr. Sobel, OWCP found in a January 2, 2009 decision that appellant had no ratable impairment from an accepted condition and denied appellant's request for a schedule award.

Appellant requested reconsideration and submitted additional medical evidence. In reports dated March 4 and April 8, 2010, Dr. Andrew Forrest, a physiatrist, found a 25 percent whole person impairment of appellant's left lower extremity using both the fifth and later the sixth edition of the A.M.A., *Guides.*

In a June 15, 2010 report, Dr. George L. Cohen, a Board-certified internist and OWCP medical adviser, reviewed Dr. Forrest's March 4 and April 8, 2010 reports. Using the same information, the medical adviser found a nine percent impairment of the left lower extremity due to lumbar radiculopathy. He explained that the accepted back condition affected an extremity and caused impairment of that extremity. The medical adviser explained that Dr. Forrest improperly rates the lumbar spine and/or whole person impairment which is not allowed under FECA.

OWCP granted appellant a schedule award on June 24, 2010 for nine percent permanent impairment of the left lower extremity.

Appellant requested reconsideration of the schedule award on August 30, 2010 and submitted a June 28, 2010 report from Dr. Forrest, who reiterated his disagreement with the earlier findings. Dr. Forrest reiterated that appellant had a 25 percent left leg impairment under the sixth edition of the A.M.A., *Guides*.

In a September 13, 2010 report, Dr. Craig Uejo, Board-certified in occupational medicine, and serving as an OWCP medical adviser, reviewed Dr. Forrest's April 8, 2010 report. He thoroughly explained the impact of the July/August 2009 edition of *The Guides Newsletter* and found that appellant had no ratable impairment of the left leg under the sixth edition of the A.M.A., *Guides.* Dr. Uejo explained that Dr. Forrest's impairment rating did not follow the A.M.A., *Guides*.

Based on Dr. Uejo's report, by decision dated September 20, 2010, OWCP modified the June 24, 2010 schedule award decision finding that there had been no impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides* as there were no notable findings of sensory or motor loss in the lower extremity. A December 10, 2010 request for reconsideration was filed and a November 24, 2010 report of Dr. Forrest was submitted in

support. Dr. Forrest disagreed that there were no findings of sensory or motor loss and identified a hyporeflexic internal hamstring tendon jerk that demonstrated "in an indirect sense" motor and/or sensory weakness. Dr. Uejo, as OWCP medical adviser, disputed this argument finding that the reflex abnormalities were not ratable factors under the sixth edition. OWCP denied appellant's request for reconsideration by decision dated April 22, 2011. It further noted that the earlier modification of the schedule award was incorrect; OWCP was rescinding the schedule award and establishing an overpayment based on the payment for the original schedule award. A May 30, 2011 request for reconsideration was filed but by decision dated July 28, 2011 OWCP denied the request without reviewing the merits of the case.

In a decision dated August 21, 2012, the Board affirmed OWCP's April 22, 2011 decision rescission of the schedule award.[3] The Board found that OWCP had not accepted a herniated disc as a result of the January 2004 employment injury. While the impairment ratings were premised on an October 14, 2009 MRI scan which identified a herniated disc and provided a medical cause for a diagnosis of radiculopathy, the medical record did not support that this condition was causally related to appellant's 2004 injury. The facts presented in the Board's August 21, 2012 decision are hereby incorporated by reference.

On August 25, 2012 appellant again requested a schedule award.

Dr. Graf, in his capacity as appellant's treating physician, provided an October 2, 2012 report which repeated his earlier diagnosis of a herniated disc at L4-5. He found on examination that appellant had a slow and hesitant gait with no motor deficits; he showed pain reaction on manipulative, palpation spring tests at thoracic levels T7-8 in a prone position and at lumbar levels L3-4, L4-5 and L5-S1, with tenderness to palpation in both sciatic notches. Dr. Graf stated that appellant's symptoms correlated with objective findings from MRI scan results. He advised that these findings supported the existence of a herniated L4-5 level disc and with intermittent inflammation of the L5 spinal nerve roots. Dr. Graf asserted that these physical findings also correlated with a secondary diagnosis of thoracic level intervertebral disc and facet joint with myofascial trigger points to the right of the midline at thoracic levels.

Dr. Graf found that appellant had a class 1 impairment and a seven percent lower extremity impairment under Table 17-4, Lumbar Spine Regional Grid, Lower Extremity Impairments, at page 570 of the A.M.A., *Guides*.[4] Using the Adjustment Grid, functional history, at Table 17-6, section 17.3a, at page 575 of the A.M.A., *Guides*,[5] he found that appellant had a grade modifier of 2 for functional history based on his score of 40 for the daily activities lower extremities questionnaire, a moderate problem; with regard to physical examination, he assigned a grade modifier of 1, for a mild problem, pursuant to Table 17-7, section 17.3b, at page 576 of the A.M.A., *Guides*;[6] and a grade modifier of 1 for clinical studies, a mild problem

[3] Docket No. 11-1915 (issued August 21, 2012).

[4] A.M.A., *Guides* 570.

[5] *Id.* at 575.

[6] *Id.* at 576.

pursuant to Table 17-8, section 17.3c at page 578 of the A.M.A., *Guides*[7] based on clinical studies.

Based on the above findings, Dr. Graf applied the net adjustments from functional history, physical examination and clinical studies to reach a net, adjusted grade modifier of plus one, at the net adjustment formula at page 582 of the A.M.A., *Guides*.[8] He stated:

> "An eight percent impairment of the thoracolumbar spine is present. This impairment of the thoracolumbar spine directly affects lower extremity functions. An 8 percent thoracolumbar impairment affecting lower extremity functions including capacity to maintain strength and function and including intermittent L5 lower extremity radiculopathy, the 8 percent impairment is converted to a 19 percent lower extremity permanent impairment, reference Table 16-10."

In a December 6, 2012 report, Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, determined that Dr. Graf's report was unclear as to whether the 19 percent lower extremity impairment rating represented a total for both lower extremities or 19 percent for each lower extremity. He also indicated that Dr. Graf's rating lacked validity because he also had relied on Chapter 17, the spinal chapter in the A.M.A., *Guides*; he asserted that this chapter is not used by OWCP and is not considered in the final rating calculations. Finally, the medical adviser explained that because Dr. Graf had not diagnosed objective sensory or motor deficits in appellant's lower extremities, there was no basis for an impairment rating in either lower extremity using the July/August 2009 edition of *The Guides Newsletter* or the A.M.A., *Guides*.

By decision dated April 2, 2013, OWCP denied appellant's schedule award claim. It found that Dr. Graf's October 2, 2012 report was not sufficient to alter its previous finding of no permanent impairment in the lower extremities under the A.M.A., *Guides*.

On April 13, 2013 appellant requested an oral hearing and submitted a March 27, 2013, report of Dr. Graf. Dr. Graf stated that on examination appellant had a diminished sensibility to touch with brush in the lateral thigh, lateral leg below the knee on the left and diminished vibration sense in the same areas. Appellant's symptoms followed an L5 spinal nerve root pattern of the left lower extremity compared with the right lower extremity. Dr. Graf diagnosed a left-sided disc herniation at the L4-5 level with mild impingement on the exiting nerve root. He also diagnosed a thoracic disc bulge, and degenerative endplate changes at T4-5, as noted by MRI scan. Dr. Graf reported that, although appellant had normal electromyogram (EMG) and nerve conduction velocity (NCV) studies, he opined that negative studies do not rule out radiculopathy. He asserted that given the consistency and findings over time and the functional impairments involved that he believed appellant had objective sensory deficits in a predominantly L5 peripheral spinal nerve root pattern. Dr. Graf determined that additional changes at thoracic levels did not appear to cause radiculopathy but contributed to his functional

[7] *Id.* at 578.

[8] *Id.* at 582.

impairments. He related that other physicians had found diminished light touch and pinprick sensation in the same pattern he described above.

Dr. Graf found that appellant had a class 2 impairment, a moderate problem, which yielded a 24 percent left lower extremity impairment under Table 16-12, Peripheral Nerve Impairment Grid, Lower Extremity Impairments, at page 534 of the A.M.A., *Guides*.[9] Using the Adjustment Grid, functional history, at Table 16-6, section 16.3a, at page 516 of the A.M.A., *Guides*,[10] Dr. Graf found that appellant had a grade modifier of 2 for functional history based on his score of 36 for the daily activities lower extremities questionnaire, a moderate problem; with regard to physical examination, he assigned a grade modifier of 2, for a moderate problem, pursuant to Table 16-7, section 16.3b, at page 517 of the A.M.A., *Guides*;[11] and a grade modifier of 2 for clinical studies, a moderate problem based on MRI scan results showing far lateral L4-5 foraminal disc herniation pursuant to Table 16-8, section 17.3c at page 519 of the A.M.A., *Guides*.[12]

Based on the above findings, Dr. Graf applied the net adjustments from functional history, physical examination and clinical studies, with grade modifiers to reach a net, adjusted grade modifier of zero, at the net adjustment formula at page 521 of the A.M.A., *Guides*.[13] He stated that under Table 16-11 at page 533 of the A.M.A., *Guides*[14] appellant had sensory abnormalities in the L5 spinal nerve root, with objective evidence of lower extremity motor loss with absent reflex activity.

By decision dated September 24, 2013, an OWCP hearing representative affirmed the April 2, 2013 decision. She found that Dr. Graf's updated impairment rating lacked probative value, due to the inconsistent findings in appellant's examinations, and that it was essentially duplicative of his prior reports which had served to create the original conflict of opinion. Therefore, OWCP's hearing representative determined that the weight of medical opinion continued to rest with Dr. Sobel, the impartial medical examiner, who found no permanent impairment in the lower extremities.

LEGAL PRECEDENT

The schedule award provision of FECA[15] and its implementing regulations[16] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

[9] *Id.* at 534.

[10] *Id.* at 516.

[11] *Id.* at 517.

[12] *Id.* at 519.

[13] *Id.* at 582.

[14] *Id.* at 533.

[15] 5 U.S.C. § 8107.

[16] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

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 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[17] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[18]

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.[19] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[20]

ANALYSIS

On appeal, appellant's counsel challenges OWCP's reliance on the July/August 2009 edition of *The Guides Newsletter* in rating nerve root impairments, which, he asserts, lacks any scientific basis or probative value. He contends that appellant was entitled to a schedule award for a 24 percent left lower extremity impairment because Dr. Graf based his rating on the appropriate tables and protocols of the sixth edition of the A.M.A., *Guides*.

Counsel asserts that previous medical reports had verified findings of radiculopathy and that Dr. Graf made findings of sensory nerve impairment which were a sufficient basis to render an impairment rating for sensory impairment of the spine. He argues that OWCP wrongfully relied on a normal EMG study. Counsel contends that an EMG study is not helpful with diagnosing impairments at the nerve root level.

The Board does not accept the contentions raised by appellant's attorney on appeal. OWCP has implemented guidelines that impairment to the upper or lower extremities caused by a spinal injury should be evaluated in accordance with the article "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" in the July/August 2009 edition of *The Guides Newsletter* published by the A.M.A., *Guides*.[21] OWCP has adopted *The Guides Newsletter* to rate spinal nerve impairments consistent with sixth edition methodology. Appellant has not

[17] *Id.*

[18] *Veronica Williams*, 56 ECAB 367, 370 (2005).

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

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

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(3) (January 2010). As noted above this newsletter has been reproduced with the permission of the American Medical Association as Exhibit 4 in Chapter 3.700.

submitted medical evidence to establish that he is entitled to a schedule award pursuant to these guidelines, which have been adopted under both OWCP and Board case law.[22]

OWCP accepted the conditions of lumbar and thoracic sprain. A schedule award is not payable for injury to the spine.[23] However, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though a spinal condition caused the impairment.[24] Appellant must first establish impairment to a scheduled member caused by the accepted condition before an impairment from an unrelated, preexisting condition becomes relevant, causally related, and can be assessed.[25]

In its August 21, 2012 decision, the Board found that the weight of the medical evidence prior to appellant's October 14, 2009 MRI scan established that he did not suffer a herniated disc as a result of his 2004 employment injury. Appellant has provided no medical opinion evidence to refute this Board finding. Subsequent to the Board's decision, appellant submitted Dr. Graf's October 2, 2012 and March 27, 2013 reports. These reports do not establish that appellant had a permanent impairment caused by his accepted lumbar and thoracic strains following the protocols of *The Guides Newsletter*. In his October 2, 2012 report, Dr. Graf reiterated his diagnosis of a herniated disc at L4-5 and stated findings of pain and tenderness on examination at T7-8 and L3-4, L4-5 and L5-S1. He asserted that appellant's symptoms correlated with objective findings from MRI scan results. Dr. Graf determined that there was a secondary diagnosis involving thoracic level disc and facet joint symptoms. He rated a 19 percent lower extremity impairment based on these findings. The medical adviser correctly determined that Dr. Graf's impairment rating lacked validity because he continued to rely on Chapter 17 of the A.M.A., *Guides*, rather than the July/August 2009 edition of *The Guides Newsletter.*

Dr. Graf alternatively found in his March 27, 2013 report that appellant had a 24 percent left lower extremity impairment under Table 16-12 at page 534 of the A.M.A., *Guides*. He stated that on examination appellant had a diminished sensibility to touch with brush in the lateral thigh, lateral leg below the knee on the left and diminished vibration sense in the same distribution, *i.e.*, an L5 spinal nerve root pattern of the left lower extremity as compared with the right lower extremity. Dr. Graf further noted that appellant experienced pain at L4-5 and T9-10. He reiterated his diagnosis of herniation at the L4-5 level as indicated by MRI scan. Dr. Graf stated that under Table 16-11 at page 533 appellant had sensory abnormalities in the L5 spinal nerve root, with objective evidence of lower extremity motor loss with absent reflex activity.

Dr. Graf's March 27, 2013 report is not sufficient. While he noted that appellant had sensory abnormalities in the L5 spinal nerve root distribution, he did not provide sufficient objective findings to meet the standards for rating a lower extremity impairment caused by appellant's accepted lumbar and thoracic conditions set forth in the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*. Dr. Graf's impairment

[22] *See, e.g., N.E.*, Docket No. 13-187 (issued April 19, 2013).

[23] *Pamela J. Darling*, 49 ECAB 286, n.7 (1998).

[24] *Thomas J. Engelhart*, 50 ECAB 319, n.8 (1999).

[25] *See generally Thomas P. Lavin*, 57 ECAB 353 (2006).

evaluation is still premised upon his diagnoses of herniated thoracic and lumbar discs, which are not accepted as causally related to the employment injury. OWCP properly determined that Dr. Graf's reports did not provide a basis for a schedule award under FECA based on his accepted conditions.

The Board will affirm the September 24, 2013 OWCP decision.

CONCLUSION

The Board finds that appellant has not sustained any permanent impairment causally related to his accepted lumbar and thoracic conditions.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.[26]

Issued: September 16, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[26] Richard J. Daschbach, Chief Judge, participated in the preparation of the decision but was longer a member of the Board after May 16, 2014.