

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

G.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Ana, CA, Employer**

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**Docket No. 16-1086
Issued: December 8, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 26, 2016 appellant, through counsel, filed a timely appeal from a March 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has a ratable impairment of the left lower extremity and more than one percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ In a decision dated December 24, 2013, the Board determined that the April 2, 2012 and January 14, 2013 reports from appellant's treating physician, Dr. Charles Xeller, a Board-certified orthopedic surgeon, and the July 19, 2012 report from OWCP's medical adviser Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, lacked probative value as they did not properly apply the specific methodology for rating spinal nerve impairments affecting the lower extremities in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), June 2009 *Guides Newsletter*. The Board set aside OWCP's February 5 and June 4, 2013 decisions and remanded the case for OWCP to request a medical opinion that properly evaluated appellant's permanent impairment of the lower extremities pursuant to the sixth edition of the A.M.A., *Guides*.

The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On September 30, 2008 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained herniated lumbar discs and lumbar radiculitis as a result of the repetitive duties of his employment. He stopped work on July 21, 2008 and returned to work on September 30, 2008.

OWCP accepted this claim for multiple lumbosacral disc bulges, L5-S1 nerve root impingement with radiculopathy, and lumbosacral spondylolisthesis. Medical benefits were authorized. Wage-loss benefits were paid on the supplemental rolls from November 17 until December 2, 2008 and from January 23 until March 30, 2012.

Appellant retired from federal service on June 1, 2012.

Upon remand from the Board's December 24, 2013 decision, OWCP requested a supplemental opinion from Dr. Harris. In an August 25, 2014 report, Dr. Harris reviewed appellant's case file and noted his accepted conditions of lumbosacral multilevel disc bulging, L5-S1 nerve root impingement with radiculopathy, and lumbosacral spondylolisthesis. He described the medical treatment that appellant received and reported that, for purposes of calculating a schedule award according to the A.M.A., *Guides*, appellant had zero percent impairment of the right and left lower extremities. Dr. Harris explained that, although appellant had continued problems with lumbar radiculopathy, there was no objective evidence of neurologic deficit in the right or left lower extremities in Dr. Xeller's April 2, 2012 and January 14, 2013 reports. He noted a date of maximum medical improvement (MMI) of

³ Docket No. 13-1649 (issued December 24, 2013).

November 23, 2011, as indicated in Dr. Xeller's April 2, 2012 report. Dr. Harris related that he disagreed with Dr. Xeller's use of Table 17-4 of the A.M.A., *Guides*, which provided impairment based on mechanical low back pain, radiculopathy, and documented spinal pathology, because OWCP did not grant schedule awards based on spinal pain.

In a letter dated September 26, 2014, OWCP requested that Dr. Harris provide further rationale for the change in his prior opinion, set forth in his July 19, 2012 report, that appellant had one percent permanent impairment of his right lower extremity. It also asked for Dr. Harris to confirm whether he utilized the July/August 2009 *Guides Newsletter* from the A.M.A., *Guides* as the basis for his impairment assessment.

Dr. Harris responded to OWCP's letter and in a report dated October 5, 2014 he related that his July 19, 2012 impairment rating of one percent permanent right lower extremity impairment was based on the lack of neurologic deficit found in Dr. Xeller's April 2, 2012 report, appellant's continued complaints of right lumbar radiculopathy, and a September 21, 2010 positive electrodiagnostic examination. He confirmed his opinion that appellant now had zero percent impairment of the right and left lower extremities because Dr. Xeller's January 14, 2013 report contained no evidence of ongoing problems with right lumbar radiculopathy or evidence of neurologic deficit in either lower extremity. Dr. Harris explained that, even though appellant had a history of positive electrodiagnostic studies, the lack of ongoing problems with right lumbar radiculopathy established that appellant had zero percent lower extremity impairment. He indicated that his calculation was based on the July/August 2009 *Guides Newsletter*.

Appellant also submitted various progress reports. In a May 5, 2014 progress report, Dr. Edward Mittleman, a family practitioner, examined appellant for complaints of low back pain. He conducted an examination and recommended that appellant continue his home exercises and return in six months for reevaluation. In a November 4, 2014 report, Dr. Hosea Brown, III, a Board-certified internist, related that appellant presented for follow-up examination of low back pain. He noted that appellant had reached the point of MMI status as of November 23, 2011. Dr. Brown provided physical examination findings and diagnosed lumbosacral multiple disc bulges, L5-S1 nerve impingement with radiculopathy, and lumbosacral spondylolisthesis.

In a decision dated May 18, 2015, OWCP found that the medical evidence failed to establish that appellant had a ratable impairment of the left lower extremity or more than one percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

On May 27, 2015 OWCP received appellant's request, through counsel, for a hearing. A hearing was held on January 12, 2016. Appellant was represented by counsel at the hearing and he noted that his last electrodiagnostic testing was two or three years ago because OWCP denied him any more medical testing. He explained that he only had his physical checkup with his primary physician every six months. Appellant related that he continued to experience numbness, tingling, and loss of sensation in his right leg.

In a November 10, 2015 progress report, Dr. Brown indicated that appellant had reached MMI as of November 23, 2011. Upon examination, he observed mild-to-moderate discomfort upon range of motion examination with mild-to-moderate spasm of the paraspinal lumbosacral musculature. Dr. Brown diagnosed lumbosacral multiple disc bulging, L5-S1 nerve impingement with radiculopathy, and lumbosacral spondylolisthesis.

By decision dated March 30, 2016, an OWCP hearing representative affirmed the May 18, 2015 decision. She determined that the medical evidence failed to establish that appellant had a ratable impairment of the left lower extremity and no more than one percent permanent impairment of the right lower extremity in accordance with the July/August 2009 *Guides Newsletter*.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as the appropriate standards for evaluating schedule losses.⁵

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.⁶ 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.⁷

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.⁸ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404 (1999); *see also* *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Richard R. LeMay*, 56 ECAB 341 (2005); *Pamela J. Darling*, 49 ECAB 286 (1998).

⁷ *K.H.*, Docket No. 09-341 (issued December 30, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁸ *Rozella L. Skinner*, 37 ECAB 398 (1986).

section 3.700 of its procedures, which memorializes proposed tables as outlined in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment (July/August 2009 edition) of the sixth edition.⁹

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS

OWCP accepted appellant's claim for multiple lumbosacral disc bulges, L5-S1 nerve root impingement with radiculopathy, and lumbosacral spondylolisthesis as a result of his federal employment. Appellant submitted a claim for a schedule award on June 18, 2012. OWCP granted a schedule award for one percent permanent impairment of the right lower extremity and denied any ratable impairment of the left lower extremity as a result of his accepted lumbar conditions. The Board finds that the medical evidence of record does not establish that appellant sustained more than one percent permanent impairment of the right lower extremity and any ratable impairment of the left lower extremity due to his accepted lumbar conditions.

In support of his claim appellant submitted reports dated April 2, 2012 and January 14, 2013 by Dr. Xeller, who determined that appellant had seven percent whole person impairment as a result of his accepted lumbar conditions. Dr. Xeller provided examination findings and indicated that appellant reached MMI on November 23, 2011. He explained that, according to Table 17-4, page 570, of the A.M.A., *Guides*, appellant had seven percent impairment for multiple protrusions at other levels and nonverifiable radicular complaints.

Following the Board's remand decision, OWCP returned the case file to Dr. Harris, who again reviewed appellant's schedule award claim. In an August 25, 2014 report, Dr. Harris noted that there was no objective evidence of neurologic deficit in appellant's right or left lower extremity according to Dr. Xeller's January 14, 2013 report. Thus, he determined that appellant had zero percent impairment of the bilateral lower extremities in accordance with the A.M.A., *Guides*. Dr. Harris noted a date of MMI of November 23, 2011. In an October 5, 2014 supplemental report, he indicated that his calculations were based on the July/August 2009 *Guides Newsletter*.

The Board finds that OWCP's medical adviser properly concluded that because there was no objective evidence of neurologic deficit in appellant's bilateral lower extremities, appellant has failed to prove a ratable impairment of the bilateral lower extremities.¹¹ Dr. Harris properly utilized *The Guides Newsletter* July/August 2009 and provided medical rationale for his

⁹ 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.

¹⁰ See *id.*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹¹ *D.B.*, Docket No. 16-0059 (issued March 14, 2016).

impairment rating. The medical evidence, therefore, fails to demonstrate that appellant has more than one percent permanent impairment of the right upper extremity and any ratable impairment of the left lower extremity as a result of his accepted condition under the sixth edition of the A.M.A., *Guides*.

The additional progress reports by Drs. Mittleman and Brown are also insufficient to establish appellant's entitlement to greater impairment to his bilateral lower extremities as neither physician reached any conclusion with regard to permanent impairment.¹² Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*, addressing how he has more than one percent permanent impairment of the right lower extremity and any ratable impairment of the left lower extremity as a result of his accepted lumbar conditions. Accordingly, the weight of the medical opinion evidence is accorded to Dr. Harris' August 25 and October 5, 2014 reports.

On appeal, counsel alleges that the continued use of the A.M.A., *Guides* or *The Guides Newsletter* deprives the injured worker of due process of law as it denies compensation based upon made-up articles that have never been adopted by the A.M.A., *Guides*. The Board, however, has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹³ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁴

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 failed to establish that he has a ratable impairment of the left lower extremity and more than one percent permanent impairment of the right lower extremity, for which he has received a schedule award.

¹² *Supra* note 5. Permanent impairment must be rated pursuant to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment (July/August 2009 edition) of the sixth edition.

¹³ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁴ *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board