United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 15-1792**
	)	**Issued: January 14, 2016**
U.S. POSTAL SERVICE, POST OFFICE, League City, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 August 31, 2015 appellant, through counsel, filed a timely appeal from an April 23, 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.

ISSUE

The issue is whether appellant met his burden of proof to establish a permanent impairment of the right lower extremity and/or more than nine percent impairment of the left lower extremity, for which he received schedule awards.

On appeal counsel asserts that the April 23, 2015 decision is contrary to facts and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In an August 3, 2011 decision, the Board found that at that time appellant had failed to establish a permanent impairment of his lower extremities and affirmed the July 15, 2010 OWCP decision.[2] The findings of the previous Board decision are incorporated herein by reference.

On September 7, 2011 appellant, through counsel, requested reconsideration with OWCP and submitted an October 26 2012 report from Dr. M. Stephen Wilson, an orthopedic surgeon. Dr. Wilson noted the history of injury, appellant's medical and surgical history and treatment, and reviewed medical evidence. He provided physical examination findings and opined that appellant had a significant work injury to his lumbar spine that resulted in left lower extremity radiculopathy. Dr. Wilson advised that, in accordance with proposed Table 2 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] used for rating spinal impairment, appellant had three percent left lower extremity impairment due to mild sensory and motor deficits of the L4 nerve, and 11 percent impairment of the left lower extremity due to moderate sensory and motor deficits of the L5 nerve, which yielded a total 14 percent permanent impairment of the left lower extremity.

On November 15, 2012 Dr. H. Mobley, an OWCP medical adviser,[4] reviewed Dr. Wilson's report and the medical evidence and recommended that appellant be referred for a second opinion evaluation as to whether appellant had any permanent impairment of his lower extremities.

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[2] Docket No. 10-2172 (issued August 3, 2011). On July 23, 2007 appellant, a 54-year-old distribution clerk, injured his back lifting tubs of mail. OWCP accepted his traumatic injury claim for lumbar sprain, herniated lumbar disc, and lower extremity mononeuritis. Dr. Howard B. Cotler, a Board-certified orthopedic surgeon, performed L4-5 microdiscectomy on February 12, 2008. A July 15, 2015 lower extremity electrodiagnostic study was interpreted as abnormal, with evidence of moderate left L5 radiculopathy. Dr. Cotler performed repeat lumbar surgery on February 2, 2009. Appellant returned to modified duty on June 1, 2009, stopped work on August 13, 2009, and retired effective March 5, 2010. He began treatment with Dr. Benjamin B. Tiongson, a pain management practitioner on September 4, 2009. Dr. Tiongson diagnosed chronic pain syndrome and left L5 radiculopathy. He continued to submit reports, but did not provide an impairment evaluation. Appellant filed a schedule award claim on November 10, 2009. In a January 28, 2010 report, Dr. Cotler referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*, and advised that appellant had 11 percent whole person impairment. On February 26, 2010 OWCP referred appellant to Dr. Gary C. Freeman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 22, 2010 report, Dr. Freeman concluded that, with no objective physical evidence of injury or sequelae in either leg, appellant did not have ratable permanent impairment in either leg. In a May 3, 2010 report, an OWCP medical adviser concurred with Dr. Freeman's opinion. On May 17, 2010 OWCP denied appellant's schedule award claim, finding the evidence insufficient to establish a permanent impairment of the legs. Appellant requested reconsideration on June 11, 2010 and submitted a May 27, 2010 report from Dr. Steven M. Lovitt, a Board-certified neurologist, who diagnosed thoracic and lumbar radiculopathy and peripheral neuropathy. Dr. Donald L. Mauldin, a Board-certified orthopedic surgeon, performed a second opinion evaluation on June 24, 2010 to evaluate appellant's work abilities. He did not provide an impairment evaluation. On July 15, 2010 OWCP denied modification of the May 17, 2010 decision.

[3] A.M.A., *Guides* (6th ed. 2009).

[4] Dr. Mobley's credentials could not be ascertained.

Dr. Jerome Carter, a Board-certified physiatrist, performed a second opinion evaluation and impairment rating on January 23, 2013. He provided a comprehensive report in which he noted reviewing the medical record and described extensive examination findings. Dr. Carter advised that, in accordance with proposed Table 2 for spinal nerve impairment, appellant had zero percent impairment bilaterally due to sensory deficits. He found a mild, class 1, motor deficit on the left and, after applying the net adjustment formula, concluded that appellant had one percent left lower extremity impairment in the L3 distribution, two percent impairment in the L4 distribution, and three percent impairment in the L5 distribution. Dr. Carter applied the net adjustment formula and concluded that appellant had a total seven percent left lower extremity impairment and no impairment on the right.

On February 14, 2013 Dr. Ronald Blum, a Board-certified orthopedic surgeon and OWCP medical adviser, noted his review of the record and agreed with Dr. Carter's findings and conclusion that appellant had seven percent left lower extremity permanent impairment. He found that maximum medical improvement was reached on October 26, 2012.

By decision dated February 20, 2013, OWCP granted appellant a schedule award for seven percent permanent impairment of the left leg. It found no impairment for the right leg.

Appellant, through counsel, timely requested a hearing before an OWCP hearing representative. Following a July 16, 2013 hearing, appellant submitted an August 15, 2013 report in which Dr. Wilson reported his disagreement with Dr. Blum's report, noting that Dr. Blum did not consider a June 15, 2008 electrodiagnostic study that revealed evidence of left L5 radiculopathy. Dr. Wilson maintained that his October 26, 2012 conclusions were valid.

By decision dated September 19, 2013, an OWCP hearing representative set aside the February 20, 2013 decision and remanded the case for an OWCP medical adviser to review Dr. Wilson's August 15, 2013 report, after which OWCP should issue a *de novo* decision.

On September 26, 2013 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, noted his review of the medical record. He recommended that a referee opinion be obtained regarding appellant's lower extremity impairment.

OWCP determined that a conflict in medical evidence had been created regarding appellant's lower extremity impairment, and on November 19, 2013 it referred appellant to Dr. Philip E. Rosen, a Board-certified orthopedic surgeon, for an impartial evaluation. In a December 5, 2013 report, Dr. Rosen described the history of injury, appellant's current symptoms, and his review of the medical record. He described physical examination findings and diagnosed lumbar strain syndrome, herniated nucleus pulposus at L4-5 with L5 radiculopathy, status post laminectomy, discectomy, and lumbar fusion, failed back syndrome, and chronic pain syndrome. Dr. Rosen advised that appellant had reached maximum medical improvement on January 16, 2012, and provided an impairment rating in accordance with proposed Table 2 of the sixth edition of the A.M.A., *Guides*. He found a class 1 impairment for a mild left L5 motor deficit and, after applying the net adjustment formula, concluded that appellant had seven percent left lower extremity impairment for the L5 motor deficit. Dr. Rosen further found a class 1 impairment for a mild L5 sensory deficit, and, after applying the net adjustment formula, concluded that appellant had two percent impairment for an L5 sensory

deficit. He combined the motor and sensory deficits, and concluded that appellant had a combined nine percent left leg impairment.

In reports dated December 20, 2013 and January 23, 2014, Dr. Katz noted his agreement with Dr. Rosen's findings and conclusion that maximum medical improvement had been reached on January 15, 2012 and that appellant had a combined nine percent permanent impairment of the left lower extremity.

By decision dated February 25, 2014, appellant was granted a schedule award for an additional two percent permanent impairment of the left leg, for a combined left leg impairment of nine percent. OWCP found no ratable impairment of the right leg.

Appellant, through counsel, timely requested a hearing, that was held on September 11, 2014. On November 3, 2014 an OWCP hearing representative affirmed the February 25, 2014 decision.

Appellant, through counsel, again requested reconsideration on December 10, 2014 and submitted a November 12, 2014 report from Dr. Wilson. Dr. Wilson noted that he had examined appellant on October 26, 2012. He discussed the reports of Dr. Blum, Dr. Rosen, and Dr. Katz, and asserted that his conclusion in 2012 was correct.

Following an OWCP request, Dr. Rosen reviewed Dr. Wilson's November 12, 2014 report. On January 13, 2015 he advised that, after careful review of all medical documentation and his clinical examination of appellant, his opinion remained as previously determined.[5]

In a merit decision dated April 23, 2015, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[6] and its implementing federal regulations,[7] 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.[9]

[5] Dr. Tiongson continued to submit reports describing appellant's pain management.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

The sixth edition of 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).[10] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

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.[13] 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.[14]

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.[15] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in the July/August 2009 *The Guides Newsletter*.[16]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[17] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[18] When there exist opposing medical reports of virtually equal weight

[10] *Supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at 385-419.

[12] *Id*. at 411.

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

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

[15] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[16] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, n5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

[17] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[18] 20 C.F.R. § 10.321.

and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[19]

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 nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[20] While an OWCP medical adviser may review the opinion of a referee specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility. An OWCP medical adviser cannot resolve a conflict in medical opinion.[21]

ANALYSIS

The Board initially finds that appellant failed to establish a permanent impairment of the right lower extremity. There was no medical evidence finding permanent impairment of the right lower extremity. The Board further finds that appellant did not establish more than nine percent permanent impairment of the left lower extremity for which he received schedule awards.

The accepted conditions in this case are lumbar sprain, herniated lumbar disc, and lower extremity mononeuritis. On February 20, 2013 appellant was granted a schedule award for seven percent permanent left lower extremity impairment and no impairment on the right. Following further development, in November 2013 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Wilson, an attending orthopedist, and Dr. Carter, an OWCP referral physician, regarding the degree of appellant's lower extremity impairment, and referred him to Dr. Rosen, a Board-certified orthopedic surgeon, for an impartial evaluation.

Regarding the accepted lumbar conditions, as noted above, the approach for rating impairment of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables outlined in the July/August 2009 *The Guides Newsletter*.[22]

In his December 5, 2013 report, Dr. Rosen described the history of injury, appellant's current symptoms, and his review of the medical record. He described physical examination findings and diagnosed lumbar strain syndrome, herniated disc at L4-5 with L5 radiculopathy, status post two surgical procedures, failed back syndrome, and chronic pain syndrome. Dr. Rosen advised that appellant had reached maximum medical improvement on January 16, 2012. He provided an impairment rating in accordance with proposed Table 2 of the sixth edition of the A.M.A., *Guides*, used for rating spinal nerve impairment. Dr. Rosen found a

[19] *V.G.*, 59 ECAB 635 (2008).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[21] *Richard R. Lemay*, 56 ECAB 341 (2005); Federal (FECA) Procedure Manual, *id*. at Chapter 2.808.6(g)

[22] *Supra* notes 16 and 17.

class 1 impairment for a mild left L5 motor deficit and, after applying the net adjustment formula, concluded that appellant had seven percent permanent left lower extremity impairment for the L5 motor deficit. He further found a class 1 impairment for a mild L5 sensory deficit, and, after applying the net adjustment formula, concluded that appellant had two percent impairment for a L5 sensory deficit. Dr. Rosen combined the motor and sensory deficits, and concluded that appellant had nine percent permanent left lower extremity impairment.

In a January 13, 2015 supplemental report, Dr. Rosen advised that, based on his clinical examination and after careful review of all medical documentation, including Dr. Wilson's November 12, 2014 report, his opinion remained as previously determined.

The Board finds that Dr. Rosen's opinion is thorough and well rationalized and represents the special weight of the medical evidence.[23] The Board has carefully reviewed his reports and finds that his opinion has reliability, probative value, and convincing quality with respect to its conclusions regarding the extent of appellant's permanent impairment. Dr. Rosen's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.[24] He provided medical rationale for his opinion by explaining that, after careful review of all medical documentation and his clinical examination of appellant, appellant had nine percent left lower extremity impairment. Dr. Rosen's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant has not established entitlement to a left lower extremity impairment greater than that previously awarded.

As noted, in the November 12, 2014 report, Dr. Wilson merely asserted that his prior conclusion regarding appellant's impairment was correct. He did not reexamine appellant. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.[25] Dr. Wilson had been on one side of the conflict resolved by Dr. Rosen. As such, his November 12, 2014 report is insufficient to establish that appellant is entitled to a left leg impairment greater than the nine percent found by Dr. Rosen.[26]

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 did not meet his burden of proof to establish an impairment of the right lower extremity and more than nine percent permanent impairment of the left lower extremity, for which he received schedule awards.

[23] *Barry Neutuch*, 54 ECAB 313 (2003).

[24] *See Melvina Jackson*, 38 ECAB 443 (1987).

[25] *I.J.*, 59 ECAB 471 (2008).

[26] *S.S.*, 59 ECAB 315 (2008).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 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