

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

J.N., Appellant)
and) Docket No. 15-0574
DEPARTMENT OF VETERANS AFFAIRS,) Issued: March 29, 2016
OFFICE OF INFORMATION &)
TECHNOLOGY, Philadelphia, PA, Employer)

)

Appearances:

Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 15, 2015 appellant, through his representative, filed a timely appeal of a November 30, 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 established more than three percent left lower extremity permanent impairment for which he received a schedule award.

FACTUAL HISTORY

On June 25, 2010 appellant, then a 62-year-old computer specialist, filed a traumatic injury claim alleging that on June 23, 2010 he injured his lower back and left leg. He claimed

¹ 5 U.S.C. § 8101 *et seq.*

that he fell to the floor when trying to sit in his chair plugging in the monitor for his computer. OWCP accepted the claim for lumbar intervertebral disc displacement without myelopathy. Appellant stopped work on June 29, 2010. He received compensation benefits on the periodic rolls from August 7, 2010 through August 2, 2011.

By letter dated January 13, 2013, appellant's representative advised OWCP that he had submitted a Form CA-7, claim for schedule award, to the employing establishment on December 7, 2012. He requested the status of the claim.

In a report dated October 22, 2012, Dr. Arthur Becan, an orthopedic surgeon, reviewed the medical evidence and diagnosed L4-5 herniated disc, left-sided L5 and S1 radiculopathy, chronic post-traumatic lumbosacral sprain and strain, and status post interventional pain management. Upon examination, appellant complained of daily and constant lumbar spine pain and stiffness and that the pain was aggravated by his duties as a computer specialist. Dr. Becan found that an examination of appellant's lumbar spine revealed L3-S1 posterior midline tenderness and bilateral paravertebral muscle spasm and tenderness. He also noted left side iliolumbar ligamentous and sacroiliac joint tenderness. Dr. Becan reported a 28 centimeter gastrocnemius circumference. Range of lumbar motion was 50/80 degrees forward flexion and 20/30 degrees backward, right lateral, and left lateral extension.

Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Becan placed appellant in class 1 for severe left L5 nerve root sensory deficit using Table 2 of the July/August 2009 *The Guides Newsletter*. He assigned a grade modifier 1 for Functional History (GMFH) using Table 17-6, page 575, and a grade modifier 4 for Clinical Studies (GMCS), using Table 17-9, page 581. Using the net adjustment formula of (GMFH - Class of Diagnosis (CDX)) + (GMPE - CDX) + (GMCS - CDX), Dr. Becan found that resulted in a net grade modifier of 3, equaling a six percent impairment of the left lower extremity.

Next, Dr. Becan assigned appellant in class IV/V motor strength deficit for left gastrocnemius or left S1 nerve root using Table 2 of the July/August 2009 *The Guides Newsletter*. He assigned a grade modifier 1 for functional history and a grade modifier 4 for clinical studies. Using the net adjustment formula it resulted in a net grade modifier 3, equaling a five percent impairment of the left lower extremity. Dr. Becan then combined the impairment rating to find an 11 percent combined impairment of the left lower extremity. He determined that appellant had reached maximum medical improvement as of October 22, 2012.

On May 14, 2013 an OWCP medical adviser reviewed the medical record. He determined that the date of maximum medical improvement was October 22, 2012. On review of Dr. Becan's October 22, 2012 report, the OWCP medical adviser opined that Dr. Becan erroneously recommended an 11 percent combined impairment rating. In support of this opinion, he noted that no significant sensory loss had been reported by appellant's treating physicians. Thus, the medical adviser determined that Dr. Becan's sensory deficit findings were inconsistent with the majority of physicians of record. If there was further controversy on this issue, referral to a second opinion physician was recommended. Utilizing the sixth edition of the A.M.A., *Guides*, Table 16-11 on page 533, the medical adviser determined appellant's sensory severity was zero. Using Table 2 of the July/August 2009 *The Guides Newsletter*, pages 5-6 he

placed appellant in a class 0 for no sensory deficit resulting in a zero percent lower extremity impairment. Using Table 16-11, page 533 the medical adviser assigned grade 1 for 4/5 motor strength of the left S1 distribution. Using Table 2 of the July/August 2009 *The Guides Newsletter*, page 5-6, he placed appellant in a class 1 for mild strength deficit with a default grade C or three percent left lower extremity. The medical adviser stated that no sensory deficit resulted in a zero percent lower extremity impairment. He assigned a grade modifier 0 for functional history and a grade modifier 2 for clinical studies. Using the net adjustment formula resulted in a net grade modifier 0, equaling a final grade of C or three percent impairment of the left lower extremity.

By decision dated May 15, 2013, OWCP granted appellant a schedule award for three percent permanent impairment of the left lower extremity. The award ran for 8.64 weeks for the period October 22 through December 21, 2012.

On May 28, 2013 appellant's representative requested an oral hearing before an OWCP hearing representative.

By decision dated August 16, 2013, an OWCP hearing representative set aside the May 13, 2013 schedule award decision and remanded the claim for a second opinion evaluation to resolve the discrepancy on motor or sensory loss between Dr. Becan and the numerous prior reports from appellant's treating physicians.

On November 20, 2013 OWCP referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon for an impairment rating of appellant's lower extremities.² In a January 3, 2014 report, Dr. Didizian concluded that appellant had a zero percent left lower extremity impairment. He stated that appellant "did not have true radicular complaints," but rather intermittent pain from his back to the posterior thigh. A physical examination revealed no sciatic notch or greater trochanter trigger points, negative straight leg raising, no L5 or S1 dermatome findings, and alternating gait. Range of motion included 40 degrees rotation, 10 degrees extension, 70 degrees left straight leg raising, and 90 degrees right straight leg raising.

Using Table 16-11, page 533 Dr. Didizian found a zero percent lower extremity sensory impairment as appellant had no sensory changes. Next, he found a zero percent left lower extremity motor impairment using the Table 16-11, page 533 as appellant had no weakness of the L3-5 and S1 dermatones, a zero severity, normal criteria and normal grade 5/5. Dr. Didizian also found a zero percent left lower extremity impairment using Table 2 of the July/August 2009 *The Guides Newsletter*, page 5-6. He noted a default classification of grade C which equaled a three percent impairment, but found a zero percent left lower extremity impairment due to the intact motor examination, and no applicable GMCS modifier. Dr. Didizian concluded that grade modifiers were inapplicable as there was no impairment and appellant's final left lower extremity impairment was zero percent, based upon intact motor and sensory examinations and no evidence of radiculopathy.

² OWCP had previously referred appellant for a second opinion evaluation, to determine whether he sustained a permanent impairment due to his accepted employment injury permanent impairment evaluation using the sixth edition of the A.M.A., *Guides*. In an October 1, 2013 report, Dr. Didizian examined appellant's upper extremities and concluded that he did not sustain any upper extremity injury.

In a January 29, 2014 report, an OWCP medical adviser reviewed and concurred with Dr. Didizian's opinion that appellant was not entitled to an additional schedule award. He noted that Dr. Becan's finding of severe left L5 distribution sensory deficits was inconsistent with the findings of no significant sensory loss by appellant's treating physicians.

By decision dated January 30, 2014, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence did not establish a "permanent, measurable, scheduled impairment and, thus, he was not entitled to a schedule award for left lower extremity impairment.

In a February 5, 2014 letter, appellant's representative requested a telephonic hearing before an OWCP hearing representative, which was held on August 6, 2014.

By decision dated November 30, 2014, an OWCP hearing representative affirmed the January 30, 2014 decision denying appellant's request for an additional schedule award.

LEGAL PRECEDENT

Under section 8107 of FECA³ and section 10.404 of the implementing federal regulations,⁴ schedule awards are payable for permanent impairment of specified body members, functions, or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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.⁵

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.⁶ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures provide that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* using the sixth edition (July/August 2009) is to be applied as provided in section 3.700 of its procedures. Specifically, it will address lower extremity impairments originating in the spine through Table 16-11 19 and upper extremity impairment originating in the spine through Table 15-14.⁷

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ D.J., 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, at Exhibit 4 (January 2010).

⁷ A.M.A., *Guides* 533, Table 16-11. See E.M., Docket No. 14-178 (issued September 28, 2015).

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).⁸ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.⁹ The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹⁰

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹¹

ANALYSIS

The Board finds that appellant has not established more than three percent left lower extremity impairment for which he had previously received a schedule award.

On October 22, 2012 Dr. Becan, the examining physician, diagnosed L4-5 herniated disc, left-sided L5 and S1 radiculopathy, chronic post-traumatic lumbosacral sprain and strain, and status post interventional pain management. He determined that appellant had an 11 percent impairment of the left lower extremity due to sensory and motor strength deficits. In reaching this determination, Dr. Becan placed appellant in class 1 for severe left L5 nerve root sensory deficit using Table 2 of the July/August 2009 *The Guides Newsletter*. He assigned a grade modifier 1 for GMFH using Table 17-6, page 575, and a grade modifier 4 for GMCS, using Table 17-9, page 581. Using the net adjustment formula of $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, Dr. Becan found a net grade modifier 3, equaling a six percent impairment of the left lower extremity. Next, he assigned appellant in class 4/5 motor strength deficit for left gastrocnemius or left S1 nerve root using Table 2 of the July/August 2009 *The Guides Newsletter*. Dr. Becan assigned a grade modifier 1 for GMFH using and a grade modifier 4 for GMCS. Using the net adjustment formula of $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, he found that $(1-1) + (4-1)$ resulted in a net grade modifier 3, equaling a five percent impairment of the left lower extremity. Dr. Becan then combined the impairment rating to find an 11 percent combined impairment of the left lower extremity.

OWCP referred the medical evidence to an OWCP medical adviser, who disagreed with Dr. Becan's impairment rating because Dr. Becan's sensory loss findings were inconsistent with the medical evidence of record. As instructed by OWCP hearing representative OWCP referred appellant to Dr. Didizian for a second opinion evaluation. In a January 3, 2014 report,

⁸ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The ICF, Disability and Health: A Contemporary Model of Disablement.

⁹ *Id.* at page 383-419.

¹⁰ *Id.* at page 411.

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). See C.K., Docket No. 09-2371 (issued August 18, 2010); Frantz Ghassan, 57 ECAB 349 (2006).

Dr. Didizian found that appellant had no impairment of his left lower extremity as there were no sensory or motor deficits due to the accepted lumbar condition, and no findings of radiculopathy. OWCP then referred the medical evidence to an OWCP medical adviser, who agreed with Dr. Didizian's determination that appellant had no left lower extremity impairment on January 29, 2014.

The Board finds that Dr. Becan's report is of diminished probative value as his findings were inconsistent with the findings of the other physicians of record. Thus, the Board finds that the weight of the evidence rests with the well-reasoned reports of Dr. Didizian and OWCP medical adviser's second opinion who advised that appellant had no sensory or motor deficits, and no finding of radiculopathy resulting in a zero percent left lower extremity impairment.

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 established that he is entitled to greater than three percent left lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 30, 2014 is affirmed.¹²

Issued: March 29, 2016
Washington, DC

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

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

¹² James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.