

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

D.Y., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Merrillville, IN, Employer)

Docket No. 16-0987
Issued: September 8, 2016

Appearances:
Appellant, pro se
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 8, 2016 appellant filed a timely appeal from a February 24, 2016 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 has more than three percent permanent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On July 10, 2015 appellant, then a 59-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2015 he sustained low back strain and a herniated disc

¹ 5 U.S.C. § 8101 *et seq.*

in the performance of duty. OWCP accepted the claim for right sciatica and a right herniated lumbar disc at L4-5.² Appellant worked in a limited-duty capacity beginning June 15, 2015.

A March 26, 2015 magnetic resonance imaging (MRI) scan study revealed a right paracentral L4-5 disc herniation “with encroachment on the right L4 nerve root in the lateral recess and neural foramen.”

In a progress report dated September 23, 2015, Dr. Dwight Tyndall, a Board-certified orthopedic surgeon, diagnosed a herniated disc on the right at L4-5. On examination he found a “slightly positive straight leg raise on the right.” Dr. Tyndall indicated that appellant had continued symptoms of his disc herniation and discharged him to return as needed. He opined that he had reached maximum medical improvement.

On October 8, 2015 appellant filed a claim for a schedule award (Form CA-7). In an October 15, 2015 response, OWCP requested that he submit an impairment evaluation from his attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant advised OWCP on October 26, 2015 that his physician did not provide workers’ compensation evaluations. On November 17, 2015 OWCP referred him to Dr. Allan M. Brecher, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of any employment-related permanent impairment.

Dr. Brecher evaluated appellant on December 9, 2015. He reviewed the history of injury and medical reports of record. Dr. Brecher noted that appellant had undergone an electromyogram (EMG) on October 30, 2015, but that the report was not in the record. On examination, he found full strength of the lower extremities with symmetrical reflexes, no pain on straight leg raise, and “some decreased sensibility in the medial arch of his foot and to his heel...” Dr. Brecher determined that appellant had a right herniated disc at L4-5 “pushing on the nerve with symptoms consistent with L4 radiculopathy with decreased sensibility.” Referencing *The Guides Newsletter* (July/August 2009), he identified the diagnosis as a class 1 moderate sensory deficit at L4, which yielded a default impairment of three percent. Dr. Brecher found no adjustment for physical examination findings and noted that he did not use clinical studies as he did not have the EMG results. He applied a grade modifier of one for functional history, which did not alter the default value. Dr. Brecher concluded that appellant had three percent permanent impairment of the right lower extremity. He further indicated that appellant had reached maximum medical improvement in September 2015 as found by Dr. Tyndall.

On February 1, 2016 an OWCP medical adviser reviewed the evidence and concurred with Dr. Brecher’s finding of three percent right lower extremity impairment. He determined that appellant had a class 1 sensory impairment due to radiculopathy at L4, which under Proposed Table 2 of *The Guides Newsletter* yielded a default value of three percent. The medical adviser applied no modifier for physical examination and a grade modifier of one for functional history and clinical studies, noting that the MRI scan study found mild pathology. He

² By decision dated August 28, 2015, OWCP denied appellant’s claim for continuation of pay from January 21 to March 6, 2015 as he did not report his injury on an approved form within 30 days.

utilized the net adjustment formula and found no change from the default impairment. The medical adviser opined that appellant reached maximum medical improvement on September 23, 2015, the date that Dr. Tyndall released him from care.

By decision dated February 24, 2016, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity. The period of the award ran for 8.64 weeks from September 23, 2015, the date of maximum medical improvement, to November 22, 2015.

On appeal appellant argues that Dr. Brecher evaluated his whole body instead of his back, leg, and foot. He contends that he reached maximum medical improvement earlier than found by Dr. Tyndall. Appellant notes that he has significant pain.

LEGAL PRECEDENT

The schedule award provision of FECA,³ and its implementing federal regulations,⁴ 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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures instruct the examiner to apply *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009).⁸

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ A.M.A., *Guides* 494-531.

⁸ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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 percentage of impairment using the A.M.A., *Guides*.⁹

ANALYSIS

OWCP accepted that appellant sustained a right herniated lumbar disc at L4-5 and right sciatica due to a January 20, 2015 employment injury. On September 23, 2015 Dr. Tyndall found that he had a mild positive straight leg raise on the right and diagnosed a right L4-5 herniated disc. He determined that appellant had obtained maximum medical improvement and released him from treatment.

On October 8, 2015 appellant filed a claim for a schedule award (Form CA-7). He advised OWCP that his attending physician did not perform impairment evaluations for workers' compensation. OWCP, on November 17, 2015, referred appellant to Dr. Brecher for a second opinion examination to determine the extent of any permanent impairment.

In a report dated December 9, 2015, Dr. Brecher diagnosed a herniated disc at L4-5 causing radiculopathy with loss of sensation. He found full lower extremity strength and normal reflexes, no pain on straight leg raise, and a loss of sensation in the medial arch of the foot extending to the heel. Dr. Brecher properly identified the diagnosis as a class 1 moderate sensory deficit at L4, which he found yielded a default value of three percent under *The Guides Newsletter*. He determined that appellant had no adjustment for physical examination and a grade modifier of one for functional history, which did not alter the default value of three percent. Dr. Brecher further found that a grade modifier for clinical studies was inapplicable explaining that he did not have the EMG results. The Board finds that he properly calculated three percent right lower extremity impairment.

An OWCP medical adviser reviewed Dr. Brecher's report and concurred with his finding of three percent right lower extremity impairment. He identified the diagnosis as a class 1 moderate sensory deficit due to radiculopathy at L4 which under Proposed Table 2 of *The Guides Newsletter* yielded three percent default impairment value. The medical adviser applied a grade modifier of one for functional history and clinical studies, noting that the MRI scan study confirmed the diagnosis.¹⁰ Utilizing the net adjustment formula, the medical adviser found no change from the default value of three percent.¹¹ The Board finds no evidence demonstrating a greater percentage of impairment using the A.M.A., *Guides*.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *see also* L.R., Docket No. 14-0674 (issued August 13, 2014).

¹⁰ The A.M.A., *Guides* provides that clinical studies are not applicable if used to confirm the diagnostic severity. *See* A.M.A., *Guides* 520-21 (if a particular criterion was used to determine impairment class, it may not be used again to determine the grade); *see also* B.M., Docket No. 12-1665 (issued February 13, 2013). However, applying the grade modifier of one for clinical studies does not affect the determination of the extent of permanent impairment.

¹¹ Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMCS-CDX), or (1-1) + (1-1) = 0, yielded a zero adjustment.

On appeal appellant contends that he reached maximum medical improvement earlier than found by OWCP. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.¹² The period covered by a schedule award generally commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.¹³ The Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to the date of the award as that often results in the payment of less compensation.¹⁴ A retroactive date of maximum medical improvement is not necessarily erroneous, however, if the medical evidence establishes that the claimant did reach maximum medical improvement by such date.¹⁵ OWCP properly relied on the opinion of Dr. Tyndall, Dr. Brecher, and OWCP's medical adviser in finding that appellant had reached maximum medical improvement on September 23, 2015.

Appellant also alleges that Dr. Brecher evaluated his whole body rather than his back, leg, and foot. A schedule award is not payable under FECA for an injury to the back.¹⁶ A schedule award is payable, however, for a permanent impairment of the extremities that is due to a work-related back condition.¹⁷ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the examiner should apply *The Guides Newsletter*.¹⁸ Dr. Brecher properly applied *The Guides Newsletter* in evaluating the extent of appellant's right lower extremity impairment as a result of his accepted work injury.

Appellant additionally relates that he experiences pain as a result of his injury. He has the burden, however, to submit medical evidence showing that he has a greater permanent impairment.¹⁹

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 no more than three percent permanent impairment of the right lower extremity for which he received a schedule award.

¹² See *C.W.*, Docket No. 13-1501 (issued November 15, 2013).

¹³ See *D.H.*, Docket No. 14-0518 (issued August 4, 2014); *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

¹⁴ See *D.H.*, *id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7b (February 2013).

¹⁶ 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁷ *Denise D. Cason*, 48 ECAB 530 (1997).

¹⁸ See *supra* note 8; see also *M.C.*, Docket No. 15-1932 (issued March 7, 2016).

¹⁹ See *M.H.*, Docket No. 13-0421 (issued April 17, 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 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