

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Saint Louis, MO, Employer)

**Docket No. 16-1585
Issued: August 17, 2017**

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 August 1, 2016 appellant filed a timely appeal from a July 14, 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.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested an oral argument before the Board. By order dated April 11, 2017, the Board exercised its discretion and denied appellant's request for an oral argument, finding that his arguments on appeal could adequately be addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1585 (issued April 11, 2017).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as set forth in the Board's prior decisions and order are incorporated herein by reference. The relevant facts are as follows.

On January 31, 2009 appellant, then a 51-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed a bulging disc in his lower back as a result of climbing, walking, and bending while completing route inspections in the performance of duty. He first became aware of his condition and realized that it resulted from his federal employment on January 20, 2009. The claim form did not indicate whether appellant stopped work.

OWCP accepted appellant's claim for lumbar sprain.

On May 22, 2009 appellant filed a claim for a schedule award (Form CA-7).

In a September 11, 2009 letter, Dr. Randall J. Rogalsky, a Board-certified orthopedic surgeon, noted that appellant was not at maximum medical improvement (MMI). He provided examination findings. Dr. Rogalsky opined that according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant's whole person permanent impairment was approximately 27 percent.

In a January 20, 2010 report, Dr. Neil Ghodadra, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's claim, including Dr. Rogalsky's September 11, 2009 impairment rating. He reported that according to Table 16-2 of the sixth edition of the A.M.A., *Guides*, appellant had four percent permanent impairment of the left lower extremity due to sciatic nerve symptoms. Dr. Ghodadra explained that appellant had zero percent right lower extremity impairment as appellant's right leg symptoms were a result of his right knee medial meniscal tear, which was not accepted as work related by OWCP. He noted that appellant had reached MMI on September 11, 2009.

On April 20, 2010 OWCP granted four percent permanent impairment of his left lower extremity. It also determined that he did not have any permanent impairment of his right lower extremity as a result of his accepted lumbar condition.

On May 3, 2010 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on August 4, 2010.⁴ In a decision dated October 20, 2010, the hearing representative affirmed OWCP's April 20, 2010 decision and determined that the medical evidence of record failed to establish that appellant had greater than four percent permanent impairment of the left lower extremity.

³ Docket No. 11-0198 (issued August 3, 2011); Docket No. 12-1279 (issued November 26, 2012); Docket No. 13-0600 (issued July 26, 2013).

⁴ The record reveals that appellant testified that he did not wish to contest the zero percent impairment rating for his right lower extremity.

Appellant filed an appeal with the Board on November 2, 2010. In a decision dated August 3, 2011, the Board determined that Dr. Ghodadra's January 20, 2010 medical report was not well reasoned as he did not apply the appropriate methodology for rating appellant's left lower extremity impairment due to his accepted lumbar condition. The Board set aside the October 20, 2010 decision and remanded the case for further medical development, to be followed by a *de novo* decision on the schedule award issue.⁵

OWCP referred appellant's claim to Dr. Sanjai Shukla, a Board-certified orthopedic surgeon and OWCP medical adviser. In a September 4, 2011 report, Dr. Shukla noted his disagreement with Dr. Rogalsky's September 11, 2009 report as the impairment was based on the whole person and utilized the fifth edition of the A.M.A., *Guides*. He opined that because appellant had no complaints of radiculopathy, he had zero percent permanent impairment of each lower extremity. Dr. Shukla noted a date of MMI of September 11, 2009.

In an October 17, 2011 report, Dr. William R. Bartley, a Board-certified orthopedic surgeon, noted appellant's continued complaints of low back pain with bilateral radiculopathy. He related that an October 14, 2011 nerve conduction velocity (NCV) study was abnormal and consistent with left L5-S1 radiculopathy. Dr. Bartley provided physical examination findings. He referenced various tables in the fifth edition of the A.M.A., *Guides*, July/August 2009 *The Guides Newsletter* and concluded that appellant had a "disability" impairment rating of 27 percent.

Dr. Shukla reviewed Dr. Bartley's October 17, 2011 impairment rating and in a February 19, 2012 report noted that appellant's symptoms of right-sided radiculopathy were inconsistent with appellant's accepted condition of lumbar sprain. He opined that it was most likely due to a new injury. Regarding appellant's left leg radiculopathy, Dr. Shukla referenced Table 16-12, page 535 of the A.M.A., *Guides*, and assigned a class 1 diagnosis for four percent permanent impairment. He reported grade modifiers of one for walking with a slight limp, one for physical examination, and one for clinical studies. After utilizing the net adjustment formula, Dr. Shukla indicated that appellant had four percent permanent impairment of the left lower extremity. He noted a date of MMI of October 17, 2011.

In a *de novo* decision dated May 3, 2012, OWCP granted four percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The date of MMI was found to be October 17, 2011.

On May 24, 2012 appellant again appealed to the Board.⁶ In an *Order Remanding Case* dated November 26, 2012, the Board found that Dr. Shukla's September 4, 2011 report was insufficiently rationalized because he did not properly utilize the July/August 2009 edition of *The Guides Newsletter* for rating spinal nerve extremity impairments pursuant to the sixth edition of the A.M.A., *Guides*. The Board remanded the case for further development, to be followed by a *de novo* decision."

⁵ Docket No. 11-0198 (issued August 3, 2011).

⁶ Docket No. 12-1279 (issued November 26, 2012).

OWCP referred appellant's claim to Dr. Christopher Gross, a Board-certified orthopedic surgeon and OWCP medical adviser. In a December 24, 2012 report, Dr. Gross related his disagreement with Dr. Bartley's impairment rating because he had not used the proper method for rating radiculopathy pursuant to FECA. He referenced the sixth edition of the A.M.A., *Guides*, and the July/August 2009 edition of *The Guides Newsletter*, Proposed Table 2 and concluded that appellant had zero percent permanent impairment of each lower extremity. Dr. Gross noted an MMI date of September 11, 2009.

In a decision dated January 9, 2013, OWCP found that appellant was not entitled to an additional schedule award greater than the four percent permanent impairment previously awarded for his left lower extremity. It found that the weight of the medical evidence rested with Dr. Gross' December 24, 2012 report.

On January 17, 2013 appellant filed another appeal with the Board. By decision dated July 26, 2013, the Board determined that Dr. Gross' December 24, 2012 report was not well rationalized because it was not based on a complete and accurate factual history. The Board pointed out that Dr. Gross reported that Dr. Bartley had not mentioned any sensory or motor deficits and that generally radicular pain is not a sign of sensory impairment. However, the Board found that, although Dr. Bartley specifically mentioned that appellant's October 14, 2011 nerve conduction velocity study (NCV) was abnormal and that the "F" wave abnormality on the left was indicative of L5-S1 radiculopathy, Dr. Gross did not address these results. The Board remanded the case for further medical development and a *de novo* decision on appellant's schedule award claim.⁷

OWCP referred appellant's case, along with the record, back to Dr. Gross to determine whether appellant had a ratable impairment of the right lower extremity and greater than four percent permanent impairment of the left lower extremity pursuant to the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*.

In a September 2, 2013 report, Dr. Gross reviewed appellant's claim and noted the accepted condition of lumbar sprain. He related that he disagreed with Dr. Bartley's October 17, 2011 impairment rating because it was based on lumbar and hip range of motion, which was not the proper methodology to determine an impairment rating for radiculopathy according to FECA. Dr. Gross noted that Dr. Bartley's report did not discuss appellant's objective findings such as motor strength and sensory loss. He explained that in order to make a final determination regarding appellant's permanent impairment of the bilateral lower extremities, he needed the latest report of the "treating surgeon," Dr. Rogalsky, which contained appellant's motor or sensory examination. Dr. Gross added that there was no evidence to support an impairment of the right lower extremity.

On September 10, 2013 OWCP forwarded Dr. Gross appellant's medical record, including Dr. Rogalsky's September 11, 2009 report, the February 20, 2008 operative report for appellant's employment-related back sprain (L5-S1 microdiscectomy), and the NCV results referenced by Dr. Bartley. It requested a supplemental report regarding the degree of any

⁷ Docket No. 13-0600 (issued July 26, 2013).

permanent impairment of the lower extremities utilizing *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*.

In a September 14, 2013 report, Dr. Gross related that he had reviewed the record and referenced the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter* in determining the date of MMI and whether there was any permanent impairment. He indicated that according to Dr. Shukla's February 19, 2012 report, a preoperative EMG study showed an L5-S1 radiculopathy. Dr. Gross noted that the EMG report was not provided. He also related that Dr. Rogalsky indicated in his September 11, 2009 report, that appellant had no myotomal or dermatomal deficit and, thus, the L5 radiculitis resulted in a class zero diagnosis with zero percent permanent impairment. Dr. Gross opined that appellant had no permanent impairment of the bilateral lower extremities. He noted a date of MMI of September 11, 2009.

By decision dated November 7, 2013, OWCP found that appellant was not entitled to a schedule award greater than the four percent permanent impairment of the left lower extremity, for which he previously received a schedule award. It determined that the weight of the medical evidence rested with Dr. Gross' September 14, 2013 medical report, which established that appellant did not have any permanent impairment of the bilateral lower extremities.

On November 14, 2013 appellant requested a review of the written record by an OWCP hearing representative. By decision dated March 13, 2014, an OWCP hearing representative found that appellant's claim was not in posture for decision and vacated the November 7, 2013 decision. She determined that there was no medical evidence of record that diagnosed a lumbar sprain in connection with his employment, but there was a medical opinion from Dr. Bartley that attributed appellant's herniated disc condition to his employment. The hearing representative remanded the case for OWCP to refer appellant to Dr. Rogalsky to provide a medical opinion on whether appellant sustained a herniated disc and/or recurrent herniated disc causally related to his federal employment. She instructed Dr. Rogalsky that, if appellant's herniated disc condition was causally related to his employment, he should provide an impairment rating of appellant's bilateral lower extremities in accordance with the July/August 2009 edition of *The Guides Newsletter*.

By letter dated May 29, 2014, OWCP requested that Dr. Rogalsky provide a rationalized opinion on whether appellant's federal employment duties caused or contributed to his herniated discs prior to the February 2008 surgery and/or to any recurrent herniated disc(s) subsequent to that surgery. If so, Dr. Rogalsky should further opine whether appellant had additional permanent impairment of his bilateral lower extremities according to the July/August 2009 edition of *The Guides Newsletter*. It provided an updated SOAF and description of appellant's employment duties. Dr. Rogalsky was afforded 30 days to respond. He did not respond within the time allotted.

In a decision dated July 16, 2014, OWCP determined that the medical evidence of record failed to establish that appellant was entitled to an additional schedule award, greater than the four percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

On July 21, 2014 OWCP received a June 13, 2014 report from Dr. Rogalsky, who related appellant's complaints of continued mechanical low back symptoms of stiffness and soreness and left lower extremity radicular pain. Upon physical examination, Dr. Rogalsky reported lumbar spasms and 50 percent loss of motion in the lumbar spine, worse on the left. Straight leg raise testing was positive at 70 degrees with positive Lesague test. Dr. Rogalsky diagnosed chronic lumbar degeneration/radiculopathy.

On July 25, 2014 appellant requested a review of the written record by an OWCP hearing representative of the July 16, 2014 decision. In a decision dated July 7, 2015, OWCP's hearing representative found that Dr. Rogalsky's July 23, 2014 report failed to address OWCP's questions. He remanded the case to OWCP for further medical development to determine whether appellant's federal employment caused or contributed to his herniated disc condition and, if so, whether appellant had a permanent impairment of the bilateral lower extremities causally related to the herniated disc condition in accordance with the sixth edition of the A.M.A., *Guides*.

On February 20, 2015 OWCP referred appellant, along with an updated SOAF and the record, to Dr. Richard Katz, Board-certified in physical medicine and rehabilitation, for a second opinion examination in order to determine whether appellant's federal employment caused or contributed to his herniated disc condition prior to the February 20, 2008 surgery, whether a diagnosis had been established, and whether the diagnosed condition was in any way causally related to his federal employment. For schedule award purposes, OWCP requested that he provide a rationalized medical opinion indicating the "permanent functional loss of use of the left and right lower extremities" in accordance with the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*. It also requested him to provide the date of MMI.

In a March 26, 2015 report, Dr. Katz provided a detailed account of appellant's history and noted that his claim was accepted for lumbar sprain. He indicated that a January 30, 2008 lumbar spine magnetic resonance imaging (MRI) examination showed L5-S1 concentric disc bulge and large broad-based disc herniation and bilateral foraminal stenosis. Dr. Katz related appellant's complaints of ongoing low back pain and left lower extremity radicular pain. Upon physical examination of appellant's lumbar spine, he observed superficial palpation lateral to the spine or axial compression and normal range of motion. Dr. Katz reported that muscle strength was normal. Straight leg raise testing, Thomas test, and femoral stretch tests were negative. Dr. Katz indicated that sensory examination was notable for slight numbness/tingling in the left lateral three toes. He reported that chart review, history, and physical examination were consistent with largely resolved left lumbar S1 radiculopathy, mild residual reflux change, low back pain, and left-sided foot numbness. Dr. Katz diagnosed lumbar radiculopathy.

In response to OWCP's questions, Dr. Katz opined that appellant's federal employment did not cause or contribute to appellant's herniated disc. He explained that appellant's lumbar pathology was a chronic degenerative process which was not work related. Dr. Katz noted that the evidence showed that the degenerative changes in appellant's spine and discs were hereditary and age related, not work related, and referenced various published medical articles, as well as medical textbooks supporting his opinion. He reported that he was not providing an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* as he did not feel that appellant's herniated disc condition was causally related to his employment.

In a decision dated May 7, 2015, OWCP found that appellant was not entitled to more than the four percent permanent impairment of the left lower extremity. It determined that the weight of medical opinion rested with Dr. Katz who concluded in his March 26, 2015 report that he did not need to provide an impairment rating because appellant's lumbar disc herniation was not causally related to his employment.

On May 21, 2015 appellant requested a review of the written record by an OWCP hearing representative. He asserted that Dr. Katz conducted his second opinion evaluation as if appellant sustained a traumatic injury, not an occupational disease that had occurred over a lengthy period of time. Appellant alleged that Dr. Katz knew there was a problem with his back, but chose not to evaluate appellant based on the information given to him by OWCP, and instead, cited appellant's age as the cause of appellant's lumbar disc herniation.

By decision dated October 30, 2015, an OWCP hearing representative found that the weight of medical opinion rested with Dr. Katz' March 26, 2015 report and found no work-related permanent impairment. Therefore, she affirmed OWCP's May 7, 2015 decision.

On April 14, 2016 appellant requested reconsideration. He related that he had worked for the employing establishment for over 30 years and had sustained a few injuries during his career. Appellant alleged that he felt discriminated against because Dr. Katz suggested his injury was age related. He stated that he started work at 23 years of age and asserted that the wear and tear on a person could cause injury.

Appellant resubmitted various progress notes dated January 24, 2014 to October 27, 2015 from Dr. Thomas B. Brummett, a Board-certified anesthesiologist, regarding treatment for his low back pain. In an October 27, 2015 note, Dr. Brummett related that appellant was doing well with his current pain medication regimen. Upon physical examination of appellant's lumbar spine, he observed normal curvature of the spine and no spine tenderness, no paraspinal spasm, no facet tenderness, and no tenderness on the sacroiliac (SI) joints. Dr. Brummett reported normal range of motion. Sensory examination was normal to light touch/deep pressure. Dr. Brummett diagnosed lumbar stenosis, lumbar post-laminectomy syndrome, lumbosacral neuritis, and chronic pain syndrome.

By decision dated July 14, 2016, OWCP denied modification of the October 30, 2015 decision. It found that the medical evidence of record failed to establish that appellant was entitled to an additional schedule award greater than the four percent permanent impairment of the left lower extremity, for which he was previously granted a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA 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 a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁹

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁰ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹¹ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the July/August 2009 edition of *The Guides Newsletter* “Rating Spinal Nerve Impairment Using the Sixth Edition” is to be applied for rating spinal nerve impairments consistent with sixth edition methodology.¹²

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁵

ANALYSIS

OWCP accepted appellant’s claim for lumbar sprain and granted appellant a schedule award for four percent permanent impairment of his left lower extremity. On July 14, 2016 it denied modification of its hearing representative’s October 30, 2015 decision, which found that the medical evidence of record failed to establish that appellant was entitled to an additional schedule award greater than the four percent permanent impairment of the left lower extremity, for which he previously received a schedule award. OWCP found that the weight of medical opinion rested with the March 26, 2015 report of Dr. Katz, the second opinion examiner, who determined that appellant had not sustained a herniated disc condition as a result of his federal employment and, accordingly, did not provide any impairment rating.

The Board finds that this case is not in posture for decision. OWCP referred appellant’s claim to Dr. Katz for a second opinion examination to determine whether appellant’s federal employment caused or contributed to his herniated disc condition and, if so, whether he sustained

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

⁹ Federal (FECA) Procedure Manual, Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁰ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹¹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹² *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹³ *See Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *See Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁵ *See R.M.*, Docket No. 16-0147 (issued June 17, 2016); *Melvin James*, 55 ECAB 406 (2004).

a ratable permanent impairment of his bilateral lower extremities due to his herniated disc condition in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 edition. In a March 26, 2015 report, Dr. Katz reviewed appellant's claim and provided examination findings. He indicated that sensory examination was notable for slight numbness/tingling in the left lateral three toes. Dr. Katz reported that chart review, history, and physical examination were consistent with largely resolved left lumbar S1 radiculopathy, mild residual reflux change, low back pain, and left-sided foot numbness. He diagnosed lumbar radiculopathy. In response to OWCP's questions, Dr. Katz opined that appellant's federal employment did not cause or contribute to appellant's herniated disc, but resulted from a chronic degenerative process which was hereditary and age related. He reported that he was not providing an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* because appellant's herniated disc condition was not causally related to his employment.

The Board finds that, while Dr. Katz responded to OWCP's questions regarding the etiology of appellant's herniated disc, it failed to ask him to address whether appellant had any additional permanent impairment to his left lower extremity as a result of his accepted condition of lumbar sprain, which was the basis for the initial schedule award and the subject of appellant's claim. The Board notes that Dr. Katz acknowledged that appellant had left lumbar S1 radiculopathy, which is a basis for rating spinal nerve impairments consistent with sixth edition methodology.¹⁶ As noted above, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁷ As OWCP did not request that Dr. Katz address whether appellant had any additional permanent impairment of appellant's left lower extremity causally related to his accepted lumbar sprain and, if so, to provide an impairment rating, his report is insufficient to resolve the pertinent issue in this case. The case will be remanded for OWCP to obtain a supplemental report from Dr. Katz for a proper evaluation of any left extremity impairment due to the accepted lumbar sprain in accordance with the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*. After such further development as OWCP deems necessary, it shall issue a *de novo* decision on appellant's claim for an increased schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development.

¹⁶ *Supra* note 9.

¹⁷ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 17, 2017
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