United States Department of Labor
Employees' Compensation Appeals Board

F.E., Appellant	)	
and	)	**Docket No. 17-0584**
	)	**Issued: December 18, 2017**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Valley Forge, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 27, 2017 appellant, through counsel, filed a timely appeal from a September 9, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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 met his burden of proof to establish ratable permanent impairment of a scheduled member, warranting a schedule award.

On appeal counsel argues that there remains a conflict of medical opinion between appellant's treating physician and OWCP's medical adviser. He contends that appellant had preexisting back conditions related to the L4, L5, and S1 levels.

FACTUAL HISTORY

On March 27, 2006 appellant, then a 47-year-old mason, filed a traumatic injury claim (Form CA-1), alleging that he reinjured his upper back on March 16, 2006 and had pain shooting down both legs. He was carrying a log which became tangled in vines causing him to twist his back while holding the weight of the log. In support of his claim, appellant submitted a lumbar magnetic resonance imaging (MRI) scan dated September 16, 2004, predating his injury, which demonstrated disc herniations at T12-L1, L1-2, and L2-3. He had a second lumbar MRI scan on March 27, 2006 which showed severe central stenosis from extruded disc from L2-3, left central extrusion or herniation at L1, and multilevel chronic discogenic disease in the lower thoracic and upper lumbar spine. Appellant underwent a lumbar laminectomy on March 30, 2006.

In a decision dated May 22, 2006, OWCP denied appellant's claim. Appellant then requested an oral hearing from OWCP's Branch of Hearings and Review.

In a report dated June 28, 2006, Dr. Frederick A. Simone, a Board-certified neurosurgeon, noted that he first examined appellant on March 29, 2006 due to low back pain radiating down both legs which had been ongoing since March 16, 2003. Appellant described lifting heavy logs on March 16, 2006 and immediately experiencing back pain with bilateral radiation into his feet. He also exhibited acute urinary incontinence. Dr. Simone performed L2 laminectomy with bilateral L2-3 discectomy on March 30, 2006 and found a large acute disc extrusion at L2-3. He opined, "Consequently, it would appear that there is a direct relationship between the lifting episode he describes on March 16, 2006 and acute development of a frankly herniated lumbar disc."

By decision dated September 14, 2006, OWCP's hearing representative found that Dr. Simone's reports were sufficient to establish appellant's traumatic injury claim for L2-3 disc herniation and reversed the May 22, 2006 decision of OWCP. He remanded the claim for OWCP to determine whether his spinal surgery was medically necessary due to the accepted condition. On September 26, 2006 OWCP accepted L2-3 disc herniation.

Appellant sought medical treatment on April 30 and July 30, 2008, as well as October 29, 2009 from Dr. William C. Welch, a Board-certified neurosurgeon of professorial rank, due to persistent low back pain and low back pressure with activities. Dr. Welch noted appellant's prior L2-3 disc rupture and discectomy in 2006 as well as an anterior cervical discectomy at C5-6 in 1999. Appellant had limited cervical and lumbar range of motion due to pain, intact motor testing, and diminished sensory testing in the S1 nerve root distribution. A lumbar MRI scan demonstrated severe lumbar stenosis at L3, 4, and 5 with moderate stenosis at L1-2. Appellant

had an electromyogram (EMG) which demonstrated acute L1-2 radiculopathy on the left and chronic S1 changes bilaterally. Dr. Welch diagnosed multilevel thoracolumbar disc ruptures, degenerative changes, and stenosis. He noted that treatment would consist of surgical decompression and thoracolumbar fusion, but recommended against further surgery.

Appellant filed a schedule award claim (Form CA-7) on May 26, 2015.

In support of this claim, appellant submitted a March 19, 2015 report from Dr. Nicholas P. Diamond, an osteopath. Dr. Diamond described appellant's history of carrying a log which became caught on vines, twisting appellant's low back. He reviewed Dr. Simone's and Dr. Welch's reports as well as additional MRI scans dated October 16, 2010 and March 2, 2013 which demonstrated additional findings of left-sided disc herniation at T11-12 and additional disc degeneration, herniations, and facet arthrosis with scoliosis. Appellant reported bilateral radicular pain with numbness and tingling, but denied any bladder incontinence. Dr. Diamond advised that appellant had an employment-related motor vehicle accident with injury to his cervical spine and left arm in September 2010. He also noted an employment-related 2004 lumbar spine injury with bilateral radiculopathy extending to the knees and that appellant retired from the employing establishment in August 2014. On examination, appellant intermittently walked with a forward-flexed antalgic gait and a right lower extremity limp. He had paravertebral muscle spasm and tenderness in the lumbar spine. Manual muscle strength testing of the lower extremities was 4/5 bilaterally. Appellant had diminished sensibility over the L5-S1 dermatomes bilaterally in the lower extremities. Dr. Diamond diagnosed chronic post-traumatic lumbosacral spine strain and sprain with bilateral lumbar radiculitis, L1-2, L2-3 herniated discs with multilevel spondylosis, L1-L2 radiculopathy and bilateral S1 changes based on electrodiagnostic testing. He attributed appellant's conditions to the March 16, 2006 work injury.

Dr. Diamond rated appellant's permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He found that appellant had 17 percent permanent impairment of each leg. For the right leg, the impairment ratings included class 1 moderate sensory deficit of the right L5 nerve root, a default rating of three percent permanent impairment. Dr. Diamond found a grade modifier of 2 for functional history, based on his questionnaire,[4] and a grade modifier of 2 for clinical studies.[5] He applied the net adjustment formula and determined that appellant had five percent permanent impairment due to sensory deficit of the right L5 nerve root. Dr. Diamond determined that appellant had moderate sensory deficit of the right S1 nerve root or 2 percent impairment. He determined appellant's functional history grade modifier was 2 and his clinical studies grade modifier was 4. After applying the net adjustment formula, Dr. Diamond determined that appellant had three percent permanent impairment for the right S1 nerve root.

[3] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[4] A.M.A., *Guides* 575, Table 17-6.

[5] *Id*. at 581, Table 17-9.

He noted that appellant had class 1 mild motor strength deficit of the L4 nerve root at the right hip flexors, and noted this had a default value of five percent.[6] Dr. Diamond determined that appellant's functional history grade modifier was 2 and his MRI scan resulted in a clinical studies grade modifier of 2. He applied the net adjustment formula and reached nine percent permanent impairment for the right L4 nerve root. Dr. Diamond combined appellant's lower extremity impairments to reach 17 percent.

For the left leg, Dr. Diamond found moderate sensory deficit of the left L5 nerve root, three percent impairment. He then applied the grade modifiers of functional history, 2, and clinical studies, 4, to reach a net adjustment of 4 which yielded 5 percent permanent impairment for the left L5 nerve root. Dr. Diamond found a moderate sensory deficit of the left S1 nerve root with default two percent impairment. He utilized the grade modifiers of 2 and 4 for functional history and clinical studies, respectively and, after applying the net adjustment formula, found 3 percent impairment for the left S1 nerve root. Dr. Diamond determined that appellant had a mild motor strength deficit in the left hip flexors due to impairment of the L4 nerve root, five percent default value impairment. He utilized the net adjustment formula with grade modifiers of 2 for functional history, and 2 for clinical studies. Dr. Diamond concluded that appellant's net adjustment was plus 2 which yielded 9 percent impairment for the left L4 nerve root. He reached combined left leg impairments to total 17 percent. Dr. Diamond found that appellant had reached maximum medical improvement on March 19, 2015.

OWCP referred Dr. Diamond's report and other medical records to an OWCP district medical adviser (DMA). On January 16, 2016 he found that there was no basis for a lower extremity impairment rating. The DMA noted that the accepted condition was L2-3 disc herniation with no radiculopathy. He found that Dr. Diamond based his impairment rating on deficits in the L4, L5, and S1 nerves. The DMA determined that these conditions were not related to appellant's accepted employment injury at L2-3 and that findings related to these conditions were inconsistent with the clinical findings of the other physicians of record and the electrodiagnostic findings.

In a letter dated February 16, 2016, OWCP informed appellant that Dr. Diamond had attributed his permanent impairment to deficits of the L5-S1 and L4 nerve roots. It noted, however that his claim had only been accepted for L2-3 disc herniation. OWCP requested additional medical evidence documenting permanent impairment due to his accepted conditions and afforded appellant 30 days to respond.

In a March 31, 2016 decision, OWCP found that appellant that not established permanent impairment of a scheduled member. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on April 6, 2016 regarding this decision.

Counsel appeared at the oral hearing on July 12, 2016 and argued that the medical evidence established bilateral radiculopathy in the legs. He contended that there was an unresolved conflict of medical opinion between OWCP's medical adviser and Dr. Diamond.

[6] *The Guides Newsletter*, July/August 2009, Table 2.

By decision dated September 9, 2016, OWCP's hearing representative summarized appellant's employment injuries. He found that the DMA's report constituted the weight of the medical opinion evidence and affirmed the March 31, 2016 decision. The hearing representative noted that Dr. Diamond's findings of radiculopathy did not relate to the accepted condition. He found, "Absent any residual impairment at the level of the accepted injury, there is no basis for including of any preexisting impairment at other levels which affect the same rated member. An appellant must establish impairment of a scheduled member caused by the accepted condition before impairment due to a preexisting or subsequent condition can be assessed."

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[9]

It is the claimant's burden of proof to establish a permanent impairment of the scheduled member or function as a result of any employment injury.[10] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[11]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[12] 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

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] *Tammy L. Meehan*, 53 ECAB 229 (2001); *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013).

[12] *Pamela J. Darling*, 49 ECAB 286 (1998); *K.S.*, *supra* note 10.

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.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[14] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/ August 2009) is to be applied.[15] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[16]

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[17] For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.[18]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish ratable permanent impairment of a scheduled member warranting a schedule award.

OWCP accepted appellant's claim for an L2-3 disc herniation. As noted above, a schedule award is not payable under FECA for injury to the spine.[19] However, 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.[20] The issue is whether appellant sustained permanent impairment as a result of his employment-related work injuries. The Board finds that appellant

[13] *Thomas J. Engelhart,* 50 ECAB 319 (1999); *K.S., supra* note 10.

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[15] *See G.N.,* Docket No. 10-850 (issued November 12, 2010); *see also id.* at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (February 2013).

[17] *Veronica Williams*, 56 ECAB 367 (2005).

[18] *K.S., supra* note 10; *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger,* 51 ECAB 638 (2000).

[19] *Pamela J. Darling, supra* note 12; *K.S., supra* note 10.

[20] *Thomas J. Engelhart,* 50 ECAB 319 (1999); *K.S., supra* note 10.

failed to submit sufficient evidence to establish that, as a result of his employment injury, he sustained permanent impairment to a scheduled member warranting a schedule award.[21]

In support of his schedule award claim, appellant submitted Dr. Diamond's March 19, 2015 report which addressed permanent impairment due the right L5 nerve root, right S1 nerve root, L4 nerve root, left L5 nerve root, and left S1 nerve root. The Board finds that Dr. Diamond's report is insufficient to establish appellant's percentage of permanent impairment for schedule award purposes, as the conditions on which he rated impairment have not been accepted by OWCP as causally related to the March 16, 2006 employment injury. OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as work related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[22] The Board has held that not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member. Where a claimant has not shown any permanent impairment caused by the accepted occupational exposure, the claim is not ripe for consideration of any preexisting impairment.[23]

OWCP's medical adviser disagreed with Dr. Diamond's impairment rating, noting that L4, L5, and S1 nerve root injuries were not accepted by OWCP. As appellant had no permanent impairment as a result of his accepted employment injury at L2-3 according to Dr. Diamond's report, the Board finds that he is not entitled to a schedule award for preexisting conditions of the lower extremities resulting from other impairments of his spine.

The Board finds that contrary to counsel's arguments on appeal, there is no conflict of medical opinion evidence between Dr. Diamond and the DMA. Dr. Diamond did not attribute appellant's permanent impairment to his accepted employment injury at L2-3. This was noted by the DMA. Dr. Diamond did not present, and counsel does not contend, that appellant had permanent impairment as a result of his injuries at the accepted L2-3 level. Without permanent impairment causally related to an accepted employment injury, appellant is not entitled to a schedule award merely for his preexisting impairments. It is appellant's burden of proof to establish a permanent impairment of a scheduled member as a result of an employment injury.[24] He did not submit such evidence and thus, he failed to meet his burden of proof.[25]

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.

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[21] *K.S., supra* note 10; *W.R.*, Docket No. 13-492 (issued June 26, 2013).

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(d) (February 2013). *See also Raymond E. Gwynn*, 35 ECAB 247, 253 (1983); *K.S., supra* note 10.

[23] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[24] *Supra* note 10.

[25] *K.S., supra* note 10; *V.W.*, Docket No. 09-2026 (issued February 16, 2010); *L.F.*, Docket No. 10-343 (issued November 29, 2010).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ratable permanent impairment of a scheduled member, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.[26]

Issued: December 18, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

[26] Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.