United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 17-0711**
	)	**Issued: December 15, 2017**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2017 appellant filed a timely appeal from a November 16, 2016 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 has established more than three percent permanent impairment of each lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On November 10, 2011 appellant, then a 38-year-old welder, filed a traumatic injury claim (Form CA-1) alleging that on October 31, 2011 he injured his lower back while lifting a

[1] 5 U.S.C. § 8101 *et seq.*

heavy tool box. He stopped work on November 1, 2011. OWCP accepted the claim for displacement of L5-S1 intervertebral disc without myelopathy. Appellant received intermittent wage-loss compensation on the supplemental rolls as of December 16, 2011.

Appellant underwent lumbar surgery on March 19, 2012. In a report of that date, Dr. Christopher Kain, a Board-certified orthopedic surgeon, related that a central L5-S1 decompression with bilateral foraminotomies and right-sided discectomy was performed. Appellant stopped working and returned to light duty on June 4, 2012. He underwent an L5-S1 discectomy on January 23, 2013. Appellant received wage-loss compensation on the periodic rolls commencing March 10, 2013.

Dr. Kain recommended that appellant undergo L5-S1 fusion surgery in an April 19, 2013 report. An OWCP second opinion referral physician, Dr. Richard Polin, a Board-certified neurosurgeon, opined in a July 12, 2013 report that the proposed surgery was not appropriate. Dr. Polin found there were preexisting symptoms and also indicated that appellant could work light duty.

OWCP referred the case to Dr. J. Douglas Werschkul, a Board-certified neurosurgeon selected as a referee physician, to resolve a conflict in the medical evidence as to whether the proposed surgery was medically appropriate. In a report dated August 27, 2013, Dr. Werschkul opined that appellant continued to have work-related residuals and the proposed fusion surgery was appropriate. On October 2, 2013 an L5-S1 interbody fusion procedure was performed by Dr. Kain.

In an April 15, 2014 report, Dr. Kain noted that appellant had some low back pain, but no leg pain, numbness, or tingling. He provided results on examination, reporting intact sensation for the lower extremities.

On April 17, 2014 appellant submitted a schedule award claim (Form CA-7). In a report dated April 28, 2014, Dr. Marc Suffis, Board-certified in occupational medicine, provided a history and results on examination.[2] He opined that appellant had four percent lower extremity permanent impairment based on S1 sensory deficit. Dr. Suffis reported that a magnetic resonance imaging (MRI) scan had shown right S1 nerve root displacement and, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) Newsletter, there was four percent lower extremity permanent impairment.[3]

Appellant returned to full duty on April 29, 2014.

In a report dated May 29, 2014, an OWCP medical adviser, Dr. Kenneth Sawyer, opined that it was inappropriate to provide an impairment rating for a neurologic defect based on an MRI scan. He wrote that multiple physicians had noted nonphysiologic findings on examination, and Dr. Suffis had reported that appellant's sensory findings were nondermatomal. Dr. Sawyer

[2] Dr. Suffis wrote that the report was at the request of OWCP, but there is no evidence in the record that OWCP referred appellant to Dr. Suffis.

[3] It is unclear to what specific MRI scan results Dr. Suffis is referring. The record contains an April 4, 2013 MRI scan report which finds a bilateral foraminal stenosis at L5-S1 with potential impingement of the L5 nerve root.

opined that appellant had not reached maximum medical improvement (MMI) and the evidence was insufficient to establish a permanent impairment to the lower extremities.

Appellant submitted a report dated November 3, 2014 from Dr. Michael McManus, Board-certified in occupational medicine, who provided a history and results on examination. He opined that appellant had eight percent bilateral lower extremity permanent impairment under *The Guides Newsletter*. Dr. McManus found appellant had sensory deficits for the L5 and S1 nerve roots.

Dr. Sawyer reviewed the medical evidence and, in a December 8, 2014 report, indicated that he disagreed with Dr. McManus. He reported that sensory examination findings were subjective, and noted that nonphysiologic findings had been noted by other physicians, such as Drs. Kain, Polin, Werschkul, and Suffis. Dr. Sawyer noted that Dr. Kain had found a normal sensory examination. He opined there was an L5 sensory deficit that under the A.M.A., *Guides* was three percent lower extremity permanent impairment.

In a report dated January 26, 2015, Dr. McManus disagreed with Dr. Sawyer's application of *The Guides Newsletter*. He noted OWCP's medical adviser had approved an L5 sensory deficit based on electrodiagnostic study, but sensory deficits could not be confirmed by such studies. Dr. McManus opined that bilateral S1 sensory deficits were consistent with appellant's prior pathology and surgeries. He also indicated that he disagreed with Dr. Sawyer's application of the adjustment formula using a grade modifier zero for functional history.

By decision dated March 12, 2015, OWCP issued a schedule award for three percent permanent impairment of each lower extremity. The period of the award was 17.29 weeks from November 3, 2014.

Appellant requested a hearing, which was held on April 6, 2015 before an OWCP hearing representative. By decision dated June 18, 2015, the hearing representative set aside the March 12, 2015 OWCP decision. He directed OWCP to refer the case to an OWCP medical adviser to provide a reasoned opinion as to whether an S1 nerve root sensory deficit should be included in the permanent impairment determination.

By report dated December 13, 2015, an OWCP medical adviser, Dr. Stephen Dawkins, Board-certified in occupational medicine, opined that his calculation was the same as that of Dr. Sawyer. OWCP requested an additional report. By report dated February 23, 2016, another OWCP medical adviser, Dr. Morley Slutsky, Board-certified in occupational medicine, opined that there was no consistent clinical evidence of S1 dermatomal deficits. He indicated that he had not been provided medical evidence discussed in the June 18, 2015 "[Board] report" except an impairment rating from Dr. McManus and a 2013 surgery report, and he could not confirm whether the information in the report was accurate.[4] Dr. Slutsky reviewed medical evidence based on the description provided in the June 18, 2015 hearing representative decision.

[4] It appears the reference was to the June 18, 2015 hearing representative decision.

By decision dated February 26, 2016, OWCP found appellant was not entitled to more than a three percent permanent impairment to each lower extremity.[5] It found OWCP's medical adviser's opinions represented the weight of the medical evidence.

Appellant requested a hearing before an OWCP hearing representative on March 15, 2016. A hearing was held on October 6, 2016. Appellant submitted an October 13, 2016 report from Dr. McManus, who wrote that he disagreed with Dr. Slutsky's conclusions. Dr. McManus opined that appellant's bilateral S1 sensory deficits were more significant than the L5 sensory deficits. He noted that appellant had "absent bilateral ankle jerk but 2+ knee jerks bilaterally," with a documented history of an L5-S1 disc herniation compressing the right S1 nerve root. Dr. McManus recommended that appellant undergo an evaluation with a neurologist and repeat electrodiagnostic testing of his lower extremities with specific attention to his bilateral H-reflex, as H-reflex abnormalities are relatively specific for the S1 spinal nerve.

By decision dated November 16, 2016, the hearing representative affirmed the February 26, 2016 OWCP decision. She found that the reports from OWCP medical advisers represented the weight of the medical evidence.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[8]

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the A.M.A. *Guides* Newsletter "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[9]

5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[10] When there are

[5] The decision reissued the schedule award for 17.29 weeks of compensation from November 3, 2014.

[6] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[7] *A. George Lampo*, 45 ECAB 441 (1994).

[8] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[9] *Id.*

[10] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[11]

ANALYSIS

OWCP has accepted that appellant sustained displacement of L5-S1 intervertebral disc without myelopathy in the performance of duty on October 31, 2011. With respect to permanent impairment, it issued a schedule award for three percent bilateral lower extremity permanent impairment on March 12, 2015.

A review of the medical evidence, however, indicates there is a clear conflict as to the extent of lower extremity permanent impairment. Attending physician Dr. McManus opined that under *The Guides Newsletter* appellant had eight percent bilateral lower extremity permanent impairment. He found a moderate sensory deficit, grade E, for both L5 (5 percent) and S1 (3 percent). An OWCP medical adviser, Dr. Sawyer, opined in a December 8, 2014 report that only the L5 nerve root should be rated. He also disagreed with Dr. McManus as to the adjustment formula, finding that the L5 permanent impairment was a grade C impairment at three percent.

There remains an unresolved conflict in the medical evidence between Dr. McManus and Dr. Sawyer as to the extent of permanent impairment. A referral to a referee physician, pursuant to 5 U.S.C. § 8123(a), is warranted under these circumstances. The referee can address the issues of whether S1 nerve root should be included, and properly apply *The Guides Newsletter*. On return of the case record OWCP should select a referee physician in accord with established procedures. After such further development as is deemed necessary, OWCP should issue a merit decision.

CONCLUSION

The Board finds the case is not in posture for decision.

[11] *William C. Bush*, 40 ECAB 1064 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2016 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.[12]

Issued: December 15, 2017
Washington, DC

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

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

[12] Colleen Duffy Kiko, Judge, participated in the original decision, but was longer a member of the Board effective December 11, 2017.