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

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| **K.G., Appellant** | ) | |
| **and** | ) | **Docket No. 17-0797** |
| | ) | **Issued: December 13, 2017** |
| **DEPARTMENT OF VETERANS AFFAIRS, JAMES A. HALEY VETERANS HOSPTIAL Tampa, FL, Employer** | ) | |

*Appearances:*
*Michael Welsh*, for the appellant[1]
*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 28, 2017 appellant, through his representative, filed a timely appeal from a November 28, 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 permanent impairment of his lower extremities warranting a schedule award.

## ***FACTUAL HISTORY***

This case has previously been before the Board. In a decision dated May 6, 2016,[3] the Board addressed appellant's pay rate for the purpose of his August 14, 2014 upper extremity schedule award. The relevant facts and circumstances of the case are set forth below as follows.

On December 3, 2012 appellant, then a 58-year-old electrical equipment repairman, filed a traumatic injury claim (Form CA-1) alleging that he developed severe pain and burning in his neck, shoulders, arms, back, and legs on November 27, 2012. In a statement, he asserted that he was attempting to clear a room on November 27, 2012 and tried to move a 600-pound generator. The tires on the generator were flat and when appellant pulled on it he fell to the floor experiencing severe pain in his neck, shoulders, arms, back, and legs.

Appellant's attending physician, Dr. Samy F. Bishai, an orthopedic surgeon, examined appellant on December 4, 2012 and described his attempt to move the generator on November 27, 2012. He found loss of range of motion in both shoulders and diagnosed herniated lumbar disc with radiculopathy, internal derangement of the shoulders bilaterally, and cervical disc syndrome with radiculopathy.

Appellant underwent a nerve conduction velocity (NCV) study on December 5, 2012 which demonstrated extended entrapment of the posterior sciatic nerve at L5-S1. On December 11, 2012 he underwent a lumbar MRI scan which demonstrated disc bulges at L1-2, L2-3, L4-5, and L5-S1 as well as a disc herniation at L3-4. Appellant also exhibited thoracolumbar scoliosis.

By decision dated February 11, 2013, OWCP denied appellant's claim finding he failed to provide sufficient medical evidence addressing causal relationship. He requested an oral hearing on February 21, 2013 from OWCP's Branch of Hearings and Review. By decision dated May 22, 2013, the hearing representative remanded the case for a second opinion evaluation.

On June 6, 2013 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his July 8, 2013 report, Dr. Dinenberg described appellant's November 27, 2012 employment incident as attempting to move a 600-pound generator and falling down hitting his buttocks on the ground and his left shoulder into a wall. He diagnosed cervical sprain and strain, degenerative disc disease of the cervical spine, lumbar sprain and strain with right lower extremity radiculopathy, lumbar degenerative disc disease with multiple levels of severe spinal stenosis, degenerative disease of the bilateral hips, and bilateral shoulder impingement. Dr. Dinenberg responded to OWCP's questions and opined that appellant's lumbosacral sprain and strain with right lower extremity radiculopathy as well as his cervical sprain and strain were related to appellant's November 27, 2012 work incident. He

[3] Docket No. 15-1476 (issued May 6, 2016).

concluded that appellant was partially disabled and should avoid bending, kneeling, climbing, crawling, or stooping as well as work above shoulder level bilaterally. Dr. Dinenberg provided a lifting, pushing, and pulling restriction of 20 pounds.

By decision dated July 19, 2013, OWCP accepted appellant's claim for left shoulder impingement, cervical strain, and lumbar back sprain with right lower extremity radiculopathy.[4]

Appellant underwent a September 4, 2013 electromyogram and nerve conduction velocity (EMG/NCV) study which showed entrapment of the S1-2 nerve root. On September 4, 2013 the NCV study demonstrated low lumbar entrapment process involving the S1-2 roots at the sacral plexus. A February 4, 2014 NCV study revealed left-sided radiculopathy in the L5-S1 distribution. On March 13, 2014 an NCV study demonstrated generalized sensory motor peripheral polyneuropathy in the lower extremities and a superimposed right S1 radiculopathy.

On June 11, 2014 appellant underwent bilateral L3 laminectomies for lumbar stenosis. On August 5, 2014 appellant notified OWCP that he had used his personal health insurance for the back surgery.

On August 8, 2014 OWCP referred appellant for an impartial medical examination with Dr. Fabio F. Flore, a Board-certified orthopedic surgeon, to resolve a conflict between Drs. Bishai and Dinenberg regarding whether appellant had any additional conditions as a result of his November 27, 2012 employment injury.

Appellant underwent a lumbar MRI scan on August 20, 2014 which demonstrated bulging disease at L1-2. He was postsurgery at L2-3 with a posterior laminectomy and grade 1 retrolisthesis with a broad-based disc bulge and foraminal stenosis. At L3-4 appellant had a broad-based bulging annulus with flattening of the ventral thecal sac. He demonstrated central disc herniation at L4-5 with stenosis.

On September 15, 2014 Dr. Fabio F. Flore, a Board-certified orthopedic surgeon acting as an independent medical examiner, examined appellant and described his November 27, 2012 injury. He reviewed appellant's diagnostic studies and provided findings on examination. Dr. Flore found appellant's gait was normal, his Achilles tendon reflexes were bilaterally symmetric and EHL strength was bilaterally symmetric. He noted appellant's surgical incision corresponding to an L3 laminectomy. Dr. Flore diagnosed L3-4 disc herniation based on MRI scan as well as multilevel disc disease with osteophyte formation. He opined that appellant had no permanent impairment due to his lumbar spine, but a temporary aggravation of a preexisting condition. Dr. Flore noted, "The low back symptoms were assessed to be due to spinal stenosis and treated surgically with 11 June 2014, L3 laminectomy for lumbar stenosis by Dr. Jonathan

[4] Appellant filed a claim for a schedule award (Form CA-7) on May 2, 2014. By decision dated August 14, 2014, OWCP granted appellant a schedule award for 24 percent permanent impairment of his left arm. Appellant requested an oral hearing on August 19, 2014. Appellant's representative appeared at the oral hearing on March 11, 2015 before an OWCP hearing representative. By decision dated May 26, 2015, the hearing representative affirmed the schedule award. Counsel filed an appeal with the Board, contending that the pay rate for the schedule award had been improperly calculated. The Board affirmed the May 25, 2015 decision in part, but remanded for further review of the pay rate issue. By decision dated July 12, 2016, OWCP issued an amended decision as to the amount of the schedule award decision. *Supra* note 3.

Hall, and therefore this body part is considered now inactive with respect to the work-related accident."

On April 13, 2015 appellant had a lumbar spine MRI scan which showed disc bulges at L1-2, L2-3, and L3-4. The MRI scan found grade 1 retrolisthesis of L3 over L4. Appellant exhibited a right disc herniation at L4-5 and grade 1 retrolisthesis of L5 over S1 with a disc herniation at that level. The MRI scan demonstrated dextroscoliosis of the lumbar spine.

On July 28, 2015 appellant filed a claim for an additional schedule award (Form CA-7) for lower extremity permanent impairment. In support of his request, he submitted a May 4, 2015 report from Dr. Bishai. Dr. Bishai noted that appellant had lower back pain with bilateral radiation more severe down the right leg. He diagnosed herniated lumbar disc at L3-4 and L4-5 with bilateral radiculopathy more severe on the right and noted that appellant had under gone a lumbar laminectomy with disc excision at L3-4. Dr. Bishai opined that appellant had a failed surgery on his lumbar spine with no improvement and continued radiculopathy to the lower extremities. He opined that appellant had reached maximum medical improvement (MMI) on May 4, 2015. Dr. Bishai diagnosed bilateral radiculopathy of the L5 nerve root and radiculopathy of the S1 nerve root on the right side only. He noted that appellant had moderate motor deficit of the L5 nerve root bilaterally with diminished extensor halluces longus on both sides, but more severe on the right. Dr. Bishai reported sensory deficit affecting both sides, but more severe on the right. He noted that appellant had diminished sensation on the lateral aspect of the thigh, anterolateral aspect of the leg, and mid dorsum of the foot. Dr. Bishai found reflex compromise of the medial hamstrings reflex on both sides, more pronounced on the right. He reported signs and symptoms of radiculopathy of the S1 nerve root on the right side in the form of a motor deficit of reduced strength of the ankle plantar flexors of moderate degree on the right side. Dr. Bishai found a moderate sensory deficit affecting the posterior leg and lateral aspect of the foot on the right side only. He reported diminished ankle reflex on the right side.

Dr. Bishai applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[5] (A.M.A., *Guides*) and the July/August 2009 *The Guides Newsletter* to calculate appellant's impairment. Applying the proposed Table 2 for Spinal Nerve Impairment of the Lower Extremities found in *The Guides Newsletter* to the L5 nerve root, Dr. Bishai found three percent permanent impairment lower extremity for moderate sensory impairment. Dr. Bishai also found a moderate motor deficit, grade C or 13 percent permanent impairment. He determined that appellant had 16 percent permanent bilateral impairment due to the L5 nerve root. In regard to the impairment of the S1 nerve root on the right, Dr. Bishai found moderate sensory deficit for two percent permanent impairment and moderate motor deficit of eight percent permanent impairment. He determined that appellant had 10 percent permanent lower extremity impairment for the S1 nerve root on the right. Dr. Bishai determined that appellant's combined rating was 24 percent permanent right leg impairment and 16 percent permanent left leg impairment.

[5] 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).

OWCP referred the claim to a district medical adviser (DMA) and noted that it had approved the surgery Dr. Bishai referenced. On August 7, 2015 the DMA determined that appellant reached MMI on May 4, 2015. He noted that appellant had no preexisting and work-related low back conditions. The DMA found that appellant's neurological findings were subjective. He found many inconsistencies and a lack of clarity in clinical findings. The medical adviser recommended further development of the medical evidence including independent electrodiagnostic studies.

On September 1, 2015 OWCP prepared an updated SOAF which noted that the accepted conditions in the claim were shoulder tendinitis, sprain of neck, and sprain of back lumbar region with radiculopathy.

OWCP referred appellant for a second opinion evaluation with Dr. Dinenberg on September 8, 2015. In an October 20, 2015 report, Dr. Dinenberg reviewed appellant's history and noted that appellant reported lumbar pain with radiculopathy down his right thigh to his right calf and foot. He had a dead sensation in his right lower extremity and diffuse tingling in the left knee. On examination appellant exhibited a diffuse stocking-type decreased sensation at the level of the knee on the right through the calf and foot. Dr. Dinenberg opined that appellant had reached MMI. He noted that appellant had minimal diminished strength of plantar flexion of the right ankle, with decreased sensation in a stocking distribution on the right lower extremity and diminished Achilles reflex on the right. Dr. Dinenberg noted that the EMG/NCV studies were consistent with right S1 nerve root radiculopathy. He applied the A.M.A., *Guides* and found that appellant had right-sided S1 sensory and motor deficit. Dr. Dinenberg determined that appellant had a grade C moderate sensory deficit of two percent permanent impairment. He also found that appellant had a mild motor deficit of three percent permanent impairment for the S1 nerve root the right. Dr. Dinenberg combined these impairment ratings to reach five percent permanent right lower extremity impairment for both motor and sensory S1 impairment. He noted that grade modifiers for functional history and clinical studies were both one and therefore resulted in no adjustment.

A DMA agreed with Dr. Dinenberg's impairment rating on November 27, 2015, noting that it was based on the EMG studies.

By decision dated December 8, 2015, OWCP granted appellant a schedule award for an additional five percent permanent impairment of his right lower extremity. Appellant requested an oral hearing with OWCP's Branch of Hearings and Review on January 5, 2015.

Appellant underwent a lumbar MRI scan on April 11, 2016. This scan demonstrated disc bulges at L1-2, L3-4, L4-5, and L5-S1 as well as disc herniation at L3-4.

Appellant's representative appeared at the oral hearing before an OWCP hearing representative on September 13, 2016 and contended that the second opinion evaluation was premature.

By decision dated November 28, 2016, OWCP's hearing representative affirmed the December 8, 2015 schedule award determination. He found that OWCP properly referred appellant for a second opinion evaluation.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[6] and its implementing regulations[7] 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*.[8]

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.[9] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of whole person, the back, or the spine,[10] no claimant is entitled to such an award.[11]

Amendments to FECA, however, 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[12]

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.[13] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3-700 of its

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *See supra* note 5.

[9] *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

[10] FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[11] *W.D., supra* note 9. *Timothy J. McGuire*, 34 ECAB 189 (1982).

[12] *W.D., supra* note 9. *Rozella L. Skinner*, 37 ECAB 398 (1986).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5c(3) (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

procedures which memorializes proposed tables outlined in a July/August 2009, *The Guides Newsletter*.[14]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[15] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16]

## ***ANALYSIS***

The Board finds this case not in posture for a decision.

OWCP initially accepted appellant's November 27, 2012 traumatic injury for left shoulder impingement, cervical strain, and lumbar back sprain with right lower extremity radiculopathy. On July 28, 2015 appellant filed a claim for an additional schedule award for his lower extremities. In support of this claim he submitted a May 4, 2015 report from Dr. Bishai his treating physician, who opined that he had 24 percent permanent impairment of his right lower extremity impairment and 16 percent permanent impairment of his left lower extremity impairment due to radiculopathy. Dr. Bishai noted his rating was based upon bilateral radiculopathy of the L5 nerve root and radiculopathy of the S1 nerve root on the right side.

Following consideration of Dr. Bishai's opinion by a DMA, OWCP prepared an updated SOAF and made referral to a second opinion medical examiner. The SOAF noted that the accepted conditions in the claim were shoulder tendinitis, sprain of neck, and sprain of back lumbar region with radiculopathy.

Dr. Dinenberg, acting as the second opinion examiner, reported on October 20, 2015 that appellant had minimal diminished strength of plantar flexion of the right ankle, with decreased sensation in a stocking distribution on the right lower extremity and diminished Achilles reflex on the right. Dr. Dinenberg noted that the EMG/NCV study was consistent with right S1 nerve root radiculopathy. He applied the A.M.A., *Guides* and found that appellant had five percent permanent right leg impairment for both motor and sensory S1 impairment. Dr. Dinenberg did not find any left leg impairment, nor did he provide an impairment rating based upon the L5 nerve root.

OWCP's medical adviser found that Dr. Dinenberg's opinion comported with the A.M.A., *Guides*.

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4).

[15] 5 U.S.C. § 8123(a); *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

[16] *R.C.*, 58 ECAB 238 (2006).

The Board finds that there is an unresolved conflict in the medical evidence between appellant's treating physician and OWCP's referral physician regarding permanent impairment of the bilateral lower extremities. Appellant's treating physician, Dr. Bishai opined that appellant had bilateral lower extremity permanent impairment based upon bilateral radiculopathy of the L5 nerve root and radiculopathy of the S1 nerve root on the right side. OWCP's second opinion physician, Dr. Dinenberg, and OWCP's medical adviser determined that appellant had right lower extremity permanent impairment for both motor and sensory S1 impairment, with no left-sided impairment.

Accordingly, the Board finds a conflict in medical evidence as to the extent of appellant's permanent impairment of his lower extremities.[17] On remand OWCP should refer appellant, a statement of accepted facts, and a list of specific questions as to permanent impairment of the L5 and/or S1 nerves based upon radiculopathy, if any, to an appropriate Board-certified physician, serving as an independent medical examiner, to determine the extent of impairment for each lower extremity for schedule award purposes.[18]

## ***CONCLUSION***

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

[17] *J.V.*, Docket No. 16-1719 (issued April 26, 2017).

[18] *Id.*

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent this opinion of the Board.[19]

Issued: December 13, 2017
Washington, DC

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

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

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