United States Department of Labor
Employees' Compensation Appeals Board

J.O., Appellant	)	
and	)	**Docket No. 16-0905**
	)	**Issued: January 4, 2017**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, San Juan, PR, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 25, 2016 appellant filed a timely appeal from a January 19, 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 more than one percent permanent impairment to each upper and lower extremity, for which he previously received schedule awards.

FACTUAL HISTORY

On September 28, 2001 appellant, then a 33-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on August 25, 2001 when a heavy jug fell on him. OWCP has accepted the claim for low back sprain, and cervical

[1] 5 U.S.C. § 8101 *et seq.*

radiculopathy, right C6 and bilateral C8-T11. Appellant was off work from August 25, 2001 to November 15, 2002, then had a recurrence of disability commencing April 6, 2003. He received wage-loss compensation on the periodic rolls through April 2, 2014, when he elected Office of Personnel Management (OPM) benefits.

The record contains an April 13, 2014 report of a cervical electromyogram and nerve conduction velocity report for the upper extremities. There is also a similar electrodiagnostic study for the lower extremities performed on December 16, 2014.

In a report dated May 3, 2015, Dr. Tomas Hernández Ortiz, a neurologist, provided a history and results of an April 28, 2015 examination. He reported moderate loss of fingering and grip strength, with no sensory deficit in any of the modalities tested. Dr. Hernández Ortiz provided a whole person impairment of 16 percent under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) using a "Spine and Pelvis impairment calculation methodology" for the cervical and lumbar spine.

OWCP requested that an OWCP medical adviser, Dr. Henry Magliato, review the report from Dr. Hernández Ortiz and provide an opinion as to the extent of appellant's permanent impairment. In a report dated June 16, 2015, Dr. Magliato opined that the report of Dr. Hernández Ortiz was of no value in determining a permanent impairment under the A.M.A., *Guides*. He indicated that Dr. Hernández Ortiz had used diagnostic grids for the spine and whole person impairment, which were inappropriate under FECA. Dr. Magliato recommended referral to a second opinion physician.

On July 20, 2015 OWCP received a revised report dated July 11, 2015 from Dr. Hernández Ortiz. The examination results from April 28, 2015 were repeated, but Dr. Hernández Ortiz provided an opinion as to permanent impairment based on *The Guides Newsletter*. For the upper extremities, Dr. Hernández Ortiz opined that there was one percent impairment for sensory deficit and five percent for motor deficit of C6 root and T1 nerve roots. He indicated that, although only a right C6 root lesion was accepted, it was bilateral upper extremity impairment. Dr. Hernández Ortiz then reported that there would be 12 percent total permanent impairment for the bilateral C8-T1 root lesions for a total of 18 percent for the upper extremities nerve involvement. As to the lower extremities, he opined that there would be one percent for sensory deficit and three percent for motor deficit to each lower extremity.

OWCP referred appellant for a second opinion examination with Dr. Fernando Rojas, an orthopedic surgeon. In a report dated September 22, 2015, Dr. Rojas provided a history and results on an August 28, 2015 examination. He opined that appellant had two percent upper extremity permanent impairment based on carpal tunnel syndrome, with no impairment based on *The Guides Newsletter*. In applying *The Guides Newsletter*, Dr. Rojas assigned zeros for all diagnosis classes and grade modifiers.

By report dated October 27, 2015, Dr. Magliato found the second opinion physician's report was confusing and of "no value." He indicated that Dr. Rojas had provided vague calculations that were difficult to understand, and he noted that carpal tunnel syndrome was not an accepted condition. Dr. Magliato recommended referral to another second opinion physician.

In a memorandum of telephone call (CA-110) dated November 24, 2015, OWCP advised appellant that he would soon be receiving a letter for a second opinion appointment.

The record contains a letter dated November 24, 2015 from the second opinion referral service (Medical Consultants Network), advising OWCP that Dr. Rojas was the only orthopedic surgeon on panel who performed federal workers' compensation examinations. OWCP sent a letter dated November 25, 2015 to Dr. Hernández Ortiz, requesting an additional report regarding permanent impairment. It referred to *The Guides Newsletter* and noted that whole person impairments were not appropriate under FECA.

In a report dated December 12, 2015, Dr. Hernández Ortiz reported that he had already answered OWCP's questions in his July 11, 2015 report. OWCP referred the evidence to another OWCP medical adviser, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, for review.

In a report dated January 8, 2016, Dr. Harris opined that appellant had one percent permanent impairment to each upper and lower extremity. He indicated that for the upper extremities, there was one percent permanent impairment for C6 nerve root "mild pain/impaired sensation." In discussing this impairment, Dr. Harris referred to the May 3, 2015 report from Dr. Hernández Ortiz, and he indicated that Dr. Hernández Ortiz had improperly used the diagnosis-based grids for the spine. As to the lower extremities, he found there was one percent impairment for L5 mild pain/impaired sensation. Dr. Harris reported that there was no impairment for C8 and T1 radiculopathy, as the attending physician did not identify any neurological deficit consistent with radiculopathy. He indicated that electrodiagnostic studies were consistent with C6 and L5 radiculopathy.

By decision dated January 19, 2016, OWCP issued a schedule award for one percent permanent impairment of each upper and lower extremity. The period of the award was 12.00 weeks from April 28, 2015.

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.[2] 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

[2] 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).

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[4]

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.[5]

ANALYSIS

OWCP issued a schedule award for one percent permanent impairment to each upper and lower extremity, based on the January 8, 2016 report from Dr. Harris, an OWCP medical adviser. Dr. Harris based his opinion on the April 28, 2015 examination results of the attending physician, Dr. Hernández Ortiz, and his reports dated May 3 and July 11, 2015. The Board notes that OWCP had referred appellant for a second opinion examination by Dr. Rojas. The September 22, 2015 report from Dr. Rojas found no permanent impairment. As noted by an OWCP medical adviser, Dr. Magliato, the September 22, 2105 report provided little explanation or rationale regarding the conclusions provided. The record indicates OWCP considered referring appellant for another second opinion, but was advised that there were no other appropriate physicians in appellant's area.

The attending physician, Dr. Hernández Ortiz, provided reports with results of an April 28, 2015 examination. He reviewed those results and provided an opinion under *The Guides Newsletter* with respect to a permanent impairment to the upper and lower extremities in his July 11, 2015 report. As to the upper extremities, Dr. Hernández Ortiz opined that there was six percent permanent impairment based on the C6 nerve root: one percent for sensory deficit and five percent for motor deficit. Under *The Guides Newsletter*, a grade C impairment for C6 mild sensory deficit is two percent, and mild motor deficit is nine percent. Dr. Hernández Ortiz noted that OWCP had only accepted a right C6 radiculopathy, but he felt it was a bilateral condition.

Dr. Hernández Ortiz then found 12 percent permanent impairment for what he described as bilateral C8-T1 nerve lesion. It is unclear how this impairment was calculated, as he made no reference to Table 1 of *The Guides Newsletter*. If Dr. Hernández Ortiz was using sensory and motor deficits for the C8 and T1 nerve roots, he does not explain how the table was applied. Moreover, as Dr. Harris explained, an impairment based on the C8-T1 nerves was not well documented by examination or diagnostic studies. He noted the April 13, 2014 electrodiagnostic study indicated C6 radiculopathy. The Board finds the weight of the evidence with respect to C8 and T1 nerve root permanent impairment rests with the medical adviser.

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

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

[5] *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.

The January 8, 2016 report from Dr. Harris, does not, however, resolve the issue of permanent impairment to the upper and lower extremities. Dr. Harris finds that the evidence establishes only one percent permanent impairment to each extremity, based on sensory deficit from C6 (upper extremity) and L5 (lower extremity). He does not explain why a motor deficit under *The Guides Newsletter* was not appropriate for C6 or L5 nerve roots in this case. The comments from Dr. Harris regarding his opinion refer to the May 3, 2015 report from Dr. Hernández Ortiz and tables regarding spinal impairments. Dr. Hernández Ortiz applied *The Guides Newsletter* in his July 11, 2015 report. If Dr. Harris found that motor deficits for C6 and L5 were not properly documented under the provisions of the A.M.A., *Guides*,[6] he should have provided medical rationale to support the opinion. Under OWCP procedures, if an OWCP medical adviser neglects to provide rationale for the permanent impairment specified, the claims examiner should request clarification from the medical adviser.[7]

The case will be remanded to OWCP for further development. Upon remand an OWCP medical adviser should properly evaluate the findings of Dr. Hernández Ortiz and his opinion under *The Guides Newsletter* in his July 11, 2015 report. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[6] Motor deficits for the upper extremities are discussed in section 15.4a, and the severity of any deficit determined under Table 15-14, A.M.A., *Guides* 425. For the lower extremities, section 16.4a and Table 16-11 refer to motor deficits and their severity. A.M.A., *Guides* 533.

[7] *Supra* note 4 at Chapter 2.808.6(f)(2) (February 2013). *See also C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 4, 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