United States Department of Labor
Employees' Compensation Appeals Board

V.B., Appellant	)	
and	)	**Docket No. 17-1326**
	)	**Issued: October 19, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Chamblee, GA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 31, 2017 appellant filed a timely appeal from an April 5, 2017 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 of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 10, 2013 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his left lower back and left leg in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for left

[1] 5 U.S.C. § 8101 *et seq.*

lumbar sprain and displacement of a lumbar intervertebral disc without myelopathy. It paid wage-loss compensation for total disability beginning April 7, 2013.

On June 19, 2013 Dr. Plas T. James, an attending orthopedic surgeon, performed a left hemilaminotomy at L4 and L5 and a left L4-5 partial foraminotomy and decompression of the nerve roots at L4 and L5. Appellant returned to full-time modified employment on December 2, 2013.

An electromyogram (EMG) and nerve conduction velocity (NCV) study performed February 27, 2014 revealed severe radiculopathy at L5-S1.

Dr. James performed a posterior lumbar interbody fusion at L4-5 on November 19, 2014. OWCP paid wage-loss compensation for total disability beginning that date. On October 20, 2015 appellant elected to receive retirement benefits in lieu of workers' compensation commencing November 20, 2015.

Appellant on January 26, 2016 filed a claim for a schedule award (Form CA-7). By letter dated February 2, 2016, OWCP requested that Dr. James determine whether appellant had permanent impairment as a result of his accepted employment injury in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

On February 9, 2016 Dr. James opined that, according to Table 17-4 on page 570 of the A.M.A., *Guides*, appellant had 11 percent whole person impairment due to an L4-5 disc herniation requiring a decompression and fusion.

In a February 11, 2016 report, Dr. James discussed appellant's complaints of weakness and numbness in his left leg and pain in his right leg. On examination he found normal sensation of the bilateral lower extremities, 4/5 left hip strength, full motor strength in the remaining muscles, loss of range of motion of the spine, and a positive straight leg raise bilaterally. Dr. James diagnosed status post fusion at L4-5 and to rule out a recurrent herniated disc. He referred appellant for a lumbar magnetic resonance imaging (MRI) scan study.

An OWCP medical adviser reviewed the evidence on March 8, 2016. He noted that Dr. James found weakness of left hip flexion without documented sensory deficit and was referring appellant for a lumbar spine MRI scan. Citing *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment* Using the Sixth Edition (July/August 2009)[3] the medical adviser found that appellant had one percent permanent impairment of the left leg as a result of L5 lumbar radiculopathy causing mild pain and impaired sensation. He found no impairment of the right leg.

[2] 6th ed. 2009.

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

An April 22, 2016 lumbar MRI scan showed surgical scarring associated with the left foramen, and subarticular recess region, and around the exiting left L4 root and foraminal narrowing at L3-4 on the right due to a small herniation combined with facet arthropathy.

In letters dated June 2 and July 19, 2016, OWCP requested that Dr. James review the medical adviser's report and provide an impairment evaluation using the A.M.A., *Guides*.

Dr. James, in a July 22, 2016 response, related that the April 22, 2016 MRI scan showed evidence of either scar tissue or disc material, which is blocking the traversing L4-5 nerve root. Appellant also has evidence of L3-4 foraminal narrowing due to a disc herniation and facet arthropathy. On examination, he found abnormalities with 4/5 right and left hamstrings (L5), 4/5 right and left quadriceps (L2, L3, L4) and 4/5 right anterior tibialis (L4). This is based on appellant's subjective complaints including new numbness and weakness in the right upper leg along with back pain. Dr. James opined that appellant had seven percent permanent impairment of the lower extremity as a result of sensory and motor dysfunction under the sixth edition of the A.M.A., *Guides*.

By decision dated August 10, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award ran for 2.88 weeks from February 9 to 29, 2016.

Appellant, through counsel, on August 17, 2016 requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on March 1, 2017, he related that he experienced numbness in his left leg, tingling in the left foot, and problems with his right leg.

In a decision dated April 5, 2017, OWCP's hearing representative affirmed the August 10, 2016 decision. She found that the opinion of the medical adviser constituted the weight of the evidence and established that appellant did not have more than one percent permanent impairment of the left lower extremity.

On appeal appellant describes his continued symptoms of pain and numbness in the left leg due to a herniated disc at L4-5. He notes that the February 27, 2014 electrodiagnostic testing showed nerve damage.

LEGAL PRECEDENT

FECA[4] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[5] In such cases, FECA compensates an employee for loss of wage-earning capacity. In cases of physical impairment FECA, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss

[4] 5 U.S.C. § 8101 *et seq.*

[5] *Lyle E. Dayberry*, 49 ECAB 369 (1998).

of use of certain specified members of the body, regardless of the employee's ability to earn wages.[6]

A claimant has the burden of proof to establish a permanent impairment of a scheduled member or function as a result of his employment injury.[7] The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury.[8] The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[9]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[10]

OWCP's procedures further provide: "If the claimant's physician provides an impairment report, or after the second opinion is received, the case should be referred to the DMA [district medical adviser] for review."[11]

ANALYSIS

OWCP accepted appellant's claim for a sprain of the left lumbar spine and displacement of a lumbar intervertebral disc without myelopathy. On June 19, 2013 Dr. James performed a hemilaminotomy at L4-5 on the left side and a partial foraminotomy and decompression of the left L4 and L5 nerve roots. On November 19, 2014 he performed a lumbar fusion at L4-5.

Appellant filed a schedule award claim on January 26, 2016. In an impairment evaluation dated February 9, 2016, Dr. James found 11 percent whole person impairment using Table 17-4 of the A.M.A., *Guides*, relevant to rating spinal impairments. FECA, however, does not provide for impairment of the whole person.[12] Further, FECA specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[13]

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[6] *Renee M. Straubinger*, 51 ECAB 667 (2000).

[7] *See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

[8] *Manuel Gill*, 52 ECAB 282 (2001).

[9] *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[11] *Id*. at Chapter 2.808.6(e).

[12] *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[13] 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

An OWCP medical adviser reviewed the evidence on March 8, 2016 and found that appellant had one percent permanent impairment of the left lower extremity due to radiculopathy at L5 under *The Guides Newsletter*. He noted that Dr. James had referred appellant for a lumbar spine MRI scan study.

Appellant underwent the lumbar MRI scan on April 22, 2016 and it revealed surgical scarring around the left L4 nerve root and narrowing on the right at L3-4 due to a small herniation. In a July 22, 2016 report, Dr. James advised that the MRI scan showed scar tissue or material from a disc blocking the traversing L4-5 nerve root. He described abnormalities on physical examination and discussed appellant's new complaints of weakness and numbness in the right leg. Dr. James opined that he had seven percent permanent impairment of the lower extremities due to problems with sensor and motor functions.

OWCP's hearing representative found that the opinion of OWCP's medical adviser outweighed the opinion of Dr. James. She did not, however, provide a copy of the April 22, 2016 MRI scan or Dr. James' July 22, 2016 report to an OWCP medical adviser prior to making her determination. As noted, if the claimant's physician provides an impairment evaluation, the case should be referred to an OWCP medical adviser for review.[14] OWCP procedures provide that an OWCP medical adviser should verify the calculations of the attending physician and determine the percentage of impairment according to the sixth edition of the A.M.A., *Guides*.[15]

The Board finds that Dr. James' report, which was based on new diagnostic studies and included findings on examination and an impairment rating, was sufficient to warrant referral of his opinion to an OWCP medical adviser to determine the extent of any permanent impairment to appellant's left leg.[16] Consequently, the Board finds that further development of the medical evidence is required to determine the extent of appellant's permanent impairment for schedule award purposes. The case will be remanded for further development in accordance with OWCP procedures.[17] After such further development as deemed necessary, it shall issue an appropriate merit decision.

CONCLUSION

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

[14] *See supra* note 10; *see also J.M.*, Docket No. 16-0224 (issued May 20, 2016).

[15] *Id*.

[16] *See J.M., supra* note 14.

[17] *See J.W.*, Docket No. 16-0821 (issued September 9, 2016).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 19, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board