United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 18-0383**
	)	**Issued: August 22, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 20, 2017 appellant, through counsel, filed a timely appeal from a September 6, 2017 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 this case.[3]

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[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.*

[3] The Board notes that, following the September 6, 2017 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has established more than nine percent permanent impairment of his left upper extremity and five percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation and whether he has established permanent impairment of his lower extremities, for purposes of a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 31, 1990 appellant, then a 37-year-old storekeeper, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained injuries when he fell to the ground while stepping down from a trailer. OWCP assigned File No. xxxxxx822 and accepted the claim for: multiple site contusion; neck and lumbar sprains; lumbar radiculopathy; right lumbar spinal stenosis; elbow, forearm, and ankle sprains; and bilateral hand contusions.

On May 8, 1996 appellant filed another traumatic injury claim (Form CA-1) alleging that, on that date, he injured his neck, right arm, and left elbow; sustained cuts to the back of his left leg, above the knee; and twisted his lower back when he jumped back after hearing a cable snap and fell backwards.[5] OWCP assigned that claim File No. xxxxxx516 and accepted it for right arm fracture.[6]

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[4] Docket No. 06-0154 (issued June 14, 2006); *Order Remanding Case,* Docket No. 15-1018 (issued September 10, 2015).

[5] Appellant retired from the employing establishment in July 1999.

[6] On March 9, 2009 OWCP combined File Nos. xxxxxx516 and xxxxxx822, with the latter designated as the master file number.

Prior to the Board's last remand of this case, appellant's schedule award claim underwent substantial procedural development.[7] On April 2, 2015 appellant appealed the December 5, 2014 OWCP decision to the Board. In a September 10, 2015 order, the Board set aside the December 5, 2014 hearing representative's decision affirming the April 22, 2014 schedule award determination.[8] The Board found that OWCP failed to follow its procedures regarding the exclusion of medical reports. The Board remanded the case for OWCP to properly follow its procedures regarding the exclusion of medical reports, to be followed by a referral to a new impartial medical specialist to resolve the conflict of medical evidence regarding appellant's entitlement to schedule awards for his upper and lower extremities.

On remand OWCP prepared a new statement of accepted facts (SOAF) on October 1, 2015. It noted in this SOAF that appellant previously received schedule awards for nine percent permanent impairment of the left upper extremity and five percent permanent impairment of the right upper extremity.

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[7] By decision dated June 28, 2004, OWCP granted appellant a schedule award for five percent permanent impairment of the left upper extremity, which was affirmed by an OWCP hearing representative in a June 3, 2005 decision. On November 1, 2005 appellant appealed to the Board. The Board, in a decision dated June 14, 2006, set aside the June 3, 2005 hearing representative's decision and remanded the case for further development of the medical evidence. Docket No. 06-0154 (issued June 14, 2006).

In a September 29, 2006 decision, OWCP denied appellant's claim for a greater than five percent permanent impairment of the left upper extremity. An OWCP hearing representative, in a June 1, 2007 decision, affirmed the denial of an increased left upper extremity schedule award.

By decision dated February 26, 2009, OWCP found that appellant was entitled to an additional four percent permanent impairment of the left upper extremity, resulting in a total of nine percent left upper extremity permanent impairment.

By decision dated February 27, 2009, OWCP denied appellant's claim for a schedule award for his lower extremities and right upper extremity as it found no permanent impairment due to the accepted conditions.

By decision dated May 1, 2009, an OWCP hearing representative set aside the February 27, 2009 decision as OWCP failed to follow its procedures regarding exclusion of medical reports. On remand she instructed OWCP to exclude medical evidence improperly obtained and select a new impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence.

By decision dated January 9, 2010, OWCP denied appellant's claim for a schedule award for his lower extremities and right upper extremity as it found no permanent impairment due to the accepted conditions.

In a July 27, 2010 decision, an OWCP hearing representative vacated the January 9, 2010 decision as he found an unresolved conflict in the medical opinion evidence regarding appellant's bilateral upper and lower extremity impairment.

By decision dated January 31, 2013, OWCP granted appellant a schedule award for five percent right upper extremity permanent impairment. It further found zero percent bilateral lower extremity permanent impairment. On April 22, 2014 OWCP denied appellant's claim for an additional schedule award. By decision dated December 5, 2014 an OWCP hearing representative affirmed the April 22, 2014 schedule award decision which denied appellant's claim for an additional schedule award.

[8] Docket No. 15-1018 (issued September 10, 2015).

On November 13, 2015 OWCP referred appellant, together with a SOAF and medical records, to Dr. Robert Moore, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. David Weiss, a treating osteopath, and Dr. Michael McCaffrey, a second opinion Board-certified neurologist, regarding appellant's upper and lower extremity permanent impairments.

In a December 10, 2015 report, Dr. Moore, based upon a review of the medical evidence and SOAF, diagnosed lumbar and cervical degenerative disc disease, lumbar spinal stenosis, and bilateral carpal tunnel syndrome. A physical examination revealed bilateral cervical and lumbar paravertebral muscle tenderness, negative bilateral straight leg raising, and right anterior thigh hypoesthesia on light touch testing. Based on his review of the records, Dr. Moore concluded that appellant had reached maximum medical improvement for the cervical sprain as of March 7, 1990 and April 23, 2010 for the lumbar spine injury. He reported evidence of residual cervical and lumbar degenerative disc disease and lumbar stenosis. However, Dr. Moore found no objective evidence of any sensory or motor deficits consistent with either cervical radiculopathy or lumbar spine etiology. As to the right anterior thigh hypoesthesia, he opined that it was not work related and was due to meralgia paresthetica. Thus, Dr. Moore concluded that appellant had zero percent impairment of the upper extremities due to his accepted cervical condition and zero percent impairment due to his accepted lumbar condition. He further opined that appellant's bilateral hand contusions, left elbow sprain, and bilateral ankle sprains had resolved without permanent impairment.

On January 7, 2016 an OWCP district medical adviser (DMA) reviewed Dr. Moore's report and concurred with his impairment rating.

By decision dated January 25, 2016, OWCP denied appellant's claim for a schedule award for his lower extremities and an increased schedule award for his right upper extremity as it found that he had not established permanent impairment due to the accepted conditions.

In a letter dated February 1, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on June 14, 2016.

By decision dated August 23, 2016, an OWCP hearing representative vacated the January 26, 2016 schedule award decision as he found that Dr. Moore's opinion was not based on an accurate SOAF, as it did not include all of appellant's accepted conditions. The hearing representative also found Dr. Moore's opinion insufficient to resolve the conflict in the medical opinion evidence as he failed to use *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) in calculating appellant's impairment. On remand OWCP was instructed to prepare a new SOAF for Dr. Moore which was to include the accepted May 8, 1996 employment injury and note appellant's preexisting conditions.

On August 29, 2016 OWCP prepared an updated SOAF in accordance with the hearing representative's instructions. On October 27, 2016 it referred appellant for an updated evaluation with Dr. Moore.

In a supplemental report dated November 29, 2016, Dr. Moore, based on his review of additional evidence including the updated SOAF, concluded that appellant had no permanent impairment of his upper or lower extremities, warranting a schedule award or increased schedule award. He noted appellant's accepted conditions from his accepted employment injuries. Dr. Moore reviewed numerous MRI scans, as well as x-ray and electrodiagnostic testing reports. He related appellant's physical examination, finding that appellant had grade 5/5 motor strength present in all groups of the bilateral upper extremities. Biceps and triceps reflexes were symmetrical bilaterally. Dr. Moore noted mild hypesthesia to light touch testing in the volar aspect of the four digits of the right hand, and Tinel's sign over the median nerve at the right wrist. He documented range of motion of the right shoulder elicited 160 degrees of forward elevation, 120 degrees of abduction, 85 degrees of internal rotation, 90 degrees of external rotation, 30 degrees adduction, and 45 degrees of extension. There was grade 4 strength of active abduction and forward elevation of the right shoulder. Left shoulder findings were consistent with those of the right shoulder. Regarding appellant's right elbow, Dr. Moore related that appellant had range of motion up to 130 degrees and full painless right forearm pronation and supination. Full range of motion was found to be present in the right wrist, with 15 degrees of PIP flexion contracture in fingers of the right hand, with full active flexion of all digits and no triggering.

Dr. Moore noted that closed fracture of the upper end of the right humorous had been added as an accepted condition, however, he could not document the presence of a fracture of the proximal humorous. He concluded that appellant's right hand contusion and closed fracture of the upper end of the right humorous had resolved with no permanent impairment. Regarding appellant's cervical condition, Dr. Moore explained that appellant had evidence of residual cervical degenerative disc disease, however, there were no upper extremity symptoms consistent with cervical radiculopathy, no objective evidence of sensory or motor deficit, or reflex abnormality consistent with cervical radiculopathy. Therefore, he concluded that appellant had zero percent permanent impairment of the right upper extremity from the accepted cervical spine condition, pursuant to *The Guides Newsletter*. Similarly, regarding appellant's accepted lumbar injury, Dr. Moore noted that appellant had evidence of residual lumbar degenerative disc disease and lumbar spinal stenosis, however, he had no objective findings of motor or sensory deficit or reflex changes in the lower extremities consistent with a lumbar spine etiology. Therefore, he related that appellant had zero percent permanent impairment of the lower extremity from the accepted lumbar spine condition.

On December 23, 2016 the DMA reviewed the medical evidence of record including Dr. Moore's November 29, 2016 supplemental report. He concurred with Dr. Moore's zero percent impairment rating based on the lack of any clinical abnormalities. Using Dr. Moore's report, the DMA cited to *The Guides Newsletter* and the applicable tables from the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[9] to find that appellant had no permanent impairment of either the upper or lower extremities.

By decision dated January 18, 2017, OWCP found that the evidence of record was insufficient to warrant an increased schedule award for his upper extremities. It further found that

[9] A.M.A., *Guides* (6th ed. 2009).

appellant had not established a permanent impairment to a scheduled member warranting a lower extremity impairment rating. OWCP found that both Dr. Moore and the DMA opined that appellant had zero percent impairment rating of the upper and lower extremities.

In a letter dated January 26, 2017, counsel requested a telephonic hearing before an OWCP hearing representative, which was converted to a request for review of the written record.

By decision dated May 23, 2017, OWCP expanded acceptance of appellant's claim to include lumbar radiculopathy.

By decision dated September 6, 2017, OWCP's hearing representative affirmed the January 18, 2017 decision. She found that Dr. Moore's impartial medical opinion constituted the weight of the medical opinion evidence that appellant had not established greater impairment of his right and left upper extremities or any impairment to his lower extremities due to the accepted employment conditions.

LEGAL PRECEDENT

Under section 8107 of FECA[10] and section 10.404 of the implementing federal regulations,[11] schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[12]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[13] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[14] 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.[15] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures provide that *The*

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10/404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 261 (2000).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(3) (March 2017).

[15] FECA Transmittal No. 10-0004 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, at Exhibit 4 (January 2010).

Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) is to be applied as provided in section 3.700 of its procedures. Specifically, it will address lower extremity impairment originating in the spine through Table 16-11 and upper extremity impairment originating in the spine through Table 15-14.[16]

The sixth edition of the A.M.A., *Guides* provides for a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[17] Under the sixth edition, the evaluator identifies the impairment should be Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[18] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[19]

Section 8123(a) 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.[20] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[21]

ANALYSIS

The Board finds that appellant has not established more than nine percent permanent impairment of his left upper extremity and more than five percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation. The Board also finds that he has not met his burden of proof to establish permanent impairment of his lower extremities, warranting a schedule award.

By decision dated August 23, 2016, an OWCP hearing representative found that OWCP should prepare a new SOAF and thereafter refer appellant to a new impartial medical specialist. OWCP properly referred appellant to Dr. Moore, the impartial medical specialist, in order to resolve the conflict in the medical opinion evidence regarding the extent of appellant's permanent

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[16] A.M.A., *Guides* 533, Table 16-11. *See E.M.,* Docket No. 14-0178 (issued September 28, 2015).

[17] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, *The ICF: A Contemporary Model of Disablement*.

[18] A.M.A., *Guides* (6th ed. 2009), pp. 383-419.

[19] *Id.* at 411.

[20] 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.,* 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[21] *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.,* 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

impairment.[22] The Board finds that the opinion of Dr. Moore is of sufficient probative value to resolve the conflict in the medical opinion evidence.

When a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[23] The Board finds that Dr. Moore's reports are entitled to special weight and that they establish that appellant is not entitled to a schedule award or increased schedule award.

In his initial report dated December 10, 2015, Dr. Moore described his examination findings and concluded that appellant's accepted conditions had resolved. He thereafter concluded that appellant had zero percent permanent impairment of his upper and lower extremities, causally related to the accepted employment injuries.

In his supplemental report dated November 29, 2016, Dr. Moore reviewed appellant's diagnostic test findings as well as his physical examination findings. He concluded that appellant had no loss of range of motion of the extremities which would entitle him to a schedule award. Dr. Moore reviewed appellant's accepted conditions and concluded that the accepted conditions had resolved without residuals. He also concluded that appellant had no neurological impairment of the extremities, warranting a schedule award under *The Guides Newsletter* for his accepted cervical and lumbar spine conditions. Dr. Moore accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.[24] As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an IME.

Dr. Moore's supplemental opinion was properly reviewed by OWCP's DMA on December 23, 2016, who determined that appellant was not entitled to a schedule award or additional schedule award.[25]

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established more than nine percent permanent impairment of the left upper extremity and five percent permanent impairment of the right upper

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[22] OWCP properly found a conflict in the medical opinion evidence regarding permanent impairment between Dr. Michael McCaffrey, a second opinion Board-certified neurologist, and Dr. Weiss, an attending osteopath. *See supra* notes 18 and 19.

[23] *See M.S.,* Docket No. 15-1064 (issued June 15, 2016); *V.G.,* 59 ECAB 635 (2008).

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

[25] *Supra* note 14 at Chapter 3.200.4(a) (October 1990).

extremity, for which he previously received schedule award compensation. The Board further finds that he has not established permanent impairment of his lower extremities, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 6, 2017 is affirmed.

Issued: August 22, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board