United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 17-1149**
	)	**Issued: February 7, 2018**
DEPARTMENT OF THE ARMY, ARMY DEPOT, Corpus Christi, TX, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 3, 2017 appellant, through counsel, filed a timely appeal from an April 3, 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 over the merits of this case.

ISSUE

The issue is whether appellant has established more than seven percent permanent impairment of each upper extremity, for which he previously received schedule awards.

[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.*

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On December 14, 2006 appellant, then a 50-year-old aircraft overhaul trades helper, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2006 he experienced neck stiffness and numbness on the right side of his body when he hit his head on a pipe after installing an aircraft transmission. He stopped work on November 29, 2006 and returned on December 18, 2006.

OWCP accepted appellant's claim for abrasion of the face, neck sprain, and cervical radiculitis. It paid leave buy back for intermittent periods of wage-loss compensation for the periods June 17 to July 17, 2008 and September 19, 2007 to April 8, 2008.

On April 12, 2011 appellant filed a claim for a schedule award (Form CA-7).

By decision dated June 3, 2011, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish a permanent impairment to a member or function of his body as a result of the November 28, 2006 employment injury.

On June 17, 2011 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative, which was held on October 14, 2011. Counsel indicated that appellant had just obtained an appointment with a physician who would perform a schedule award impairment evaluation. He requested 30 days to submit the medical report.

In a November 4, 2011 report, Dr. M. Stephen Wilson, an orthopedic surgeon, reviewed appellant's history and conducted a physical examination. He referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and Proposed Table 1 of *The Guides Newsletter*. Dr. Wilson opined that appellant had 5 percent right upper extremity permanent impairment due to chronic C5 radicular symptoms and 6 percent right upper extremity permanent impairment due to chronic C6 radicular symptoms for a total of 11 percent permanent impairment to the right upper extremity. He also reported that appellant had 5 percent left upper extremity permanent impairment due to chronic C5 radicular symptoms and 6 percent left upper extremity permanent impairment due to chronic C6 radicular symptoms for a total of 11 percent permanent impairment to the left upper extremity.

By decision dated January 12, 2012, an OWCP hearing representative set aside the June 3, 2011 OWCP decision. She remanded the case for OWCP to refer appellant's schedule award claim to an OWCP medical adviser for review of Dr. Wilson's November 4, 2011 impairment rating report and to determine whether appellant sustained permanent impairment to a scheduled member according to the A.M.A., *Guides*.

[3] *Order Dismissing Appeal*, Docket No. 13-0053 (issued February 19, 2013), *denying petition for recon.*, Docket No. 13-0053 (issued July 18, 2013).

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

In a January 25, 2012 report, Dr. Ronald Blum, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's claim, including Dr. Wilson's November 4, 2011 impairment rating, and noted that Dr. Wilson opined that appellant had 11 percent permanent impairment of each upper extremity due to sensory deficits in appellant's cervical spine. He indicated that, in a January 5, 2007 report, Dr. Mathew T. Alexander, a Board-certified neurological surgeon, described normal strength in the upper and lower extremities and intact sensory examination. Dr. Blum reported that he could not provide an impairment rating based on a review of the record and recommended a referral for a second opinion.

OWCP referred appellant's case, along with a statement of accepted facts and a copy of the record, to Dr. Jerome O. Carter, Board-certified in physical medicine and rehabilitation, for a second opinion examination to determine whether appellant sustained permanent impairment to his upper or lower extremities due to his accepted November 28, 2006 employment injury. In a February 27, 2012 report, Dr. Carter reviewed appellant's history and related his complaints of pain in the neck and bilateral hands, arms, and shoulders. Upon physical examination of appellant's cervical spine, he noted decreased range of motion and pain. Dr. Carter reported that cervical sensation testing demonstrated decreased sensation bilaterally at C6-8 distribution and median. Examination of appellant's upper extremities showed normal motor strength and moderately abnormal sensation on bilateral C6-8 distributions.

Dr. Carter noted a date of maximum medical improvement (MMI) of November 4, 2011. He opined that, according to the A.M.A., *Guides*, *The Guides Newsletter* July/August 2009 edition, for spinal nerve injuries, appellant had a total of 14 percent permanent impairment of his bilateral upper extremities. Dr. Carter reported that, under Proposed Table 1, appellant was placed under class 1 with default value of three percent for moderate sensory deficits at left and right C6 distribution. He noted grade modifiers of 2 for functional history and zero for clinical studies, which resulted in zero net adjustment. Dr. Carter assigned class 1, default value of two percent, for moderate sensory deficits at left and right C7 distribution. He noted grade modifiers of 2 for functional history and zero for clinical studies, resulting in zero net adjustment. Dr. Carter also reported that appellant had class 1, default of two percent impairment for moderate sensory deficits at left and right C8 distribution. He noted grade modifiers of 2 for functional history and zero for clinical studies, resulting in zero net adjustment. Dr. Carter calculated that appellant had seven percent right upper extremity permanent impairment and seven percent left upper extremity permanent impairment.

In a March 26, 2012 report, Dr. Robert Meador, a Board-certified internist and OWCP medical adviser, reviewed appellant's claim, including Dr. Carter's November 4, 2011 impairment rating. He noted a date of MMI of November 4, 2011. Dr. Meador indicated that appellant had three percent permanent impairment for spinal nerve C6 deficits, two percent permanent impairment for spinal nerve C7 deficits, and two percent permanent impairment for spinal nerve C8 deficits for a total of seven percent permanent impairment of each upper extremity.

On April 2, 2012 OWCP granted a schedule award for seven percent right upper extremity and seven percent left upper extremity permanent impairment. The award ran from November 4, 2011 to September 4, 2012.

Appellant, through counsel, filed an appeal with the Board. In an order dated February 19, 2013, the Board dismissed appellant's appeal because it was untimely filed.[5] On February 26, 2013 appellant filed a petition for reconsideration from the February 19, 2013 order dismissing appeal. In an order dated July 18, 2013, the Board denied his petition for reconsideration finding that he failed to establish any error of fact or law in the Board's prior order.[6]

On November 5, 2015 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted an August 31, 2015 report by Dr. Lubor Jarolimek, an orthopedic surgeon. Dr. Jarolimek related appellant's complaints of neck stiffness and pain and bilateral hand weakness, numbness, and tingling. He reviewed appellant's history and conducted an examination. Dr. Jarolimek reported tenderness along the cervical spine and decreased range of motion. Deep tendon reflexes were 2+ in the bilateral upper extremities. He noted that sensation testing was decreased in the left upper extremity along the C6 dermatome. Dr. Jarolimek related that appellant's claim was accepted for abrasion of head, neck sprain, brachial neuritis, and cervical spinal stenosis. He noted that appellant had reached MMI.

Dr. Jarolimek indicated that, according to Proposed Table 2 the A.M.A., *Guides*, *The Guides Newsletter* July/August 2009 edition, appellant had class 1 impairment, default value of four percent, for an injured nerve root at C5. He related grade adjustments of zero for clinical studies, which resulted in two percent left upper extremity impairment, after a net adjustment of -1. Dr. Jarolimek reported that appellant was class 1 impairment, default value of one percent, for sensory loss at C6 nerve root. He noted grade modifiers of zero for clinical studies, which resulted in one percent left upper extremity impairment, after a net adjustment of -1. Dr. Jarolimek reported that appellant had class 1 impairment, default value of five percent, for motor loss at C6 nerve root. He noted grade modifiers of zero for clinical studies, which resulted in two percent left upper extremity impairment, after a net adjustment of -1. Regarding appellant's right upper extremity, Dr. Jarolimek indicated that appellant had class 1 impairment, default value of five percent, for motor loss at C6 nerve root. He noted grade modifiers of 2 for functional history and zero for clinical studies, which resulted in no net adjustment for a total of five percent right upper extremity impairment for C6 nerve root. Utilizing the Combined Values Chart, Dr. Jarolimek calculated that appellant had five percent permanent impairment of each upper extremity.

In a November 29, 2015 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's claim, including Dr. Jarolimek's August 31, 2015 impairment rating. Utilizing the A.M.A., *Guides*, *The Guides Newsletter* July/August 2009 edition, he reported that appellant had five percent right upper extremity for residual problems with mild motor weakness from his right C6 cervical radiculopathy. Regarding appellant's left upper extremity, Dr. Harris noted that appellant had two percent permanent impairment for residual problems with mild motor weakness from the left C6 cervical radiculopathy, one percent permanent impairment for residual problems with mild pain and impaired sensation from the left C6 cervical radiculopathy, resulting in five percent left upper extremity impairment. He opined

[5] Docket No. 13-0053 (issued February 19, 2013).

[6] Docket No. 13-0053 (issued July 18, 2013).

that appellant had five percent permanent impairment of each upper extremity. Dr. Harris explained that, because appellant was previously awarded seven percent permanent impairment of each upper extremity, he did not have any additional permanent impairment of either upper extremity as a result of the accepted November 28, 2006 employment injury. He noted a date of MMI of August 31, 2015.

By decision dated May 12, 2016, OWCP found that appellant was not entitled to an additional schedule award for either upper extremity. It found that the weight of the medical evidence rested with the November 29, 2015 report of Dr. Harris, an OWCP medical adviser, who determined that appellant was not entitled to more than seven percent permanent impairment of each upper extremity, for which he previously received schedule awards.

On May 23, 2016 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative.

Appellant submitted various diagnostic testing reports. In a July 25, 2016 lumbar spine magnetic resonance imaging (MRI) scan, Dr. Ning Huang, a Board-certified diagnostic radiologist, noted degenerative changes of the lumbar spine with severe bilateral L5 and moderate left L4 neural foraminal stenosis. In a December 16, 2016 cervical spine ultrasound report, Dr. Kenneth R. Cook, a Board-certified diagnostic radiologist, indicated a negative ultrasound of the soft tissues of the neck. In a January 25, 2017 cervical spine MRI scan report, Dr. Mukul Maheshwari, a radiologist, noted status post anterior fusion at C5-7 with metallic susceptibility artifact, focal area of myelomalacia seen at the C5-6 level as previously noted, 6 millimeter right paracentral disc extrusion with diffuse disc bulge at the C5-6 level with moderate narrowing of the right C5-6 neural foramen with compression examined right C6 nerve root, minimal disc bulge remaining at the C6-7 level with no significant spinal calcinosis, and moderate narrowing of the right C3-4 neural foramen with no significant spinal canal stenosis or disc disease at the C3-4 level.

A hearing was held on January 18, 2017. Appellant noted that he could not do any of the activities that he used to do prior to his injury. He related that he did not have a physician who would rate him with more than five percent permanent impairment of the bilateral upper extremities unless he had an operation on his cervical spine.

By decision dated April 3, 2017, an OWCP hearing representative affirmed OWCP's prior decision. She found that the weight of the medical evidence rested with the opinion of Dr. Harris, an OWCP medical adviser, who opined in a November 30, 2015 report that appellant was not entitled to a schedule award greater than that which was previously awarded for each upper extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The

[7] 5 U.S.C. § 8107.

method used in making such determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, permanent impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[10] A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA.[11] Moreover, neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[12] Furthermore, the back is specifically excluded from the definition of organ under FECA.[13]

In 1960, amendments to FECA 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. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[14]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[15] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[16] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform

[8] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[10] *James E. Mills*, 43 ECAB 215 (1991).

[11] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

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

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

[14] *Supra* note 10.

[15] *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also supra* note 9 at Chapter 3.700, Exhibit 1, n.5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[16] *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[17]

OWCP procedures provide that, if a claimant's physician provides an impairment rating, the case should be routed to OWCP's 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.[18]

ANALYSIS

Appellant alleged that on November 28, 2006 he sustained a traumatic injury in the performance of duty. OWCP accepted his claim for abrasion of the face, neck sprain, and cervical radiculitis. On April 2, 2012 it granted appellant schedule awards for seven percent right upper extremity and seven percent left upper extremity permanent impairment. On November 5, 2015 appellant filed a claim for an increased schedule award. OWCP denied his claim for an additional schedule award based on the reports of appellant's physician Dr. Jarolimek and Dr. Harris, an OWCP medical adviser.

The Board finds that appellant has not established that he is entitled to an additional schedule award.

Under the A.M.A., *Guides*, impairment of an extremity caused by spinal nerve injury is rated according to Proposed Table 1 of the July/August 2009 *The Guides Newsletter*.[19] Appellant's physician, Dr. Jarolimek provided an August 31, 2015 report utilizing *The Guides Newsletter*. He initially noted appellant's physical examination findings of neck stiffness and pain, as well as bilateral hand weakness, numbness, and tingling. Dr. Jarolimek assessed five percent permanent impairment of each upper extremity due to sensory and motor deficits in the C5 and C6 dermatomes. He initially explained that appellant had a class 1 impairment, with a default value of four percent, he then provided detailed clinical findings and explained how those objective elements warranted the additional percentages assessed.[20]

In a November 29, 2015 report, OWCP's medical adviser, Dr. Harris, reviewed Dr. Jarolimek August 31, 2015 impairment rating report. He referenced *The Guides Newsletter* July/August 2009 edition and determined that appellant had five percent permanent impairment of each upper extremity. Because appellant was previously awarded seven percent permanent impairment of each upper extremity, Dr. Harris determined that appellant was not entitled to an increased schedule award.[21]

[17] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[18] *See supra* note 9 at Chapter 2.808.6(e) (February 2013); *Tommy R. Martin*, 56 ECAB 273 (2005).

[19] *See supra* note 9.

[20] *See S.K.* Docket No. 16-0504 (issued June 16, 2016).

[21] *See G.J.*, Docket No. 15-1151 (issued January 27, 2016).

The diagnostic reports from Drs. Huang, Cook, and Maheshwari are of limited probative value as they contained findings on diagnostic testing, but no rating of appellant's permanent impairment.[22]

Thus, the Board finds that OWCP properly determined that the medical evidence does not establish that appellant is entitled to an additional schedule award.

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 that he has more than seven percent permanent impairment of each upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2018
Washington, DC

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

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

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

[22] *See C.W.*, Docket No. 13-0998 (issued November 1, 2013).