

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

---

**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Highland, IN, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 17-0878  
Issued: June 14, 2018**

*Appearances:*  
*Appellant, pro se*  
*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 March 13, 2017 appellant filed a timely appeal from a September 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met his burden of proof to establish more than 34 percent permanent impairment of each lower extremity, for which he previously received schedule awards.

**FACTUAL HISTORY**

On January 2, 2001 OWCP accepted that appellant, then a 40-year-old city letter carrier, sustained an occupational disease in the form of aggravation of degenerative lumbar disc disease

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

due to walking, lifting heavy mail, and carrying a heavy mailbag at work. On August 8, 2001 appellant underwent OWCP-approved laminectomy at L3-4 and L4-5 and foraminotomy at L3.

On November 9, 2004 appellant received a schedule award for five percent permanent impairment of each lower extremity. The award was calculated under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> On December 27, 2005 appellant received a schedule award for eight percent permanent impairment of each lower extremity. The award also was calculated under the standards of the fifth edition of the A.M.A., *Guides*.

On April 4, 2013 appellant received a schedule award for 21 percent permanent impairment of each lower extremity. The award was calculated under the standards of the sixth edition of the A.M.A., *Guides*.<sup>3</sup> Appellant had then been compensated for a total permanent impairment of each lower extremity of 34 percent.

On April 7, 2015 appellant filed a claim for compensation (Form CA-7) seeking an increased schedule award due to his accepted employment injury.

Appellant submitted a September 17, 2014 report in which Dr. John W. Ellis, an attending Board-certified family practitioner, determined that appellant had 38 percent permanent impairment of each lower extremity under the sixth edition of the A.M.A., *Guides*. Dr. Ellis noted that, in reaching this determination, he referenced *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).<sup>4</sup>

In April 2015, OWCP referred appellant's case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser. It requested that Dr. Slutsky review the medical evidence of record, including Dr. Ellis' September 17, 2014 report, and provide an opinion on the extent of appellant's permanent impairment.

In an April 24, 2015 report, Dr. Slutsky asserted that Dr. Ellis had consistently documented findings of L4, L5, and S1 nerve root deficits which were not supported by objective diagnostic test results of the findings of other physicians of record. He recommended that appellant be referred for a second opinion examination with a Board-certified orthopedic surgeon.

On June 5, 2015 OWCP wrote to Dr. Ellis and forwarded him a copy of Dr. Slutsky's April 24, 2015 report. It afforded Dr. Ellis 30 days to review the report and provide his response to address the issues raised by Dr. Slutsky. On July 13, 2015 OWCP received a June 29, 2015 report in which Dr. Ellis indicated that his opinion remained the same as expressed in his September 17, 2014 report.

In October 2015, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Ellis and Dr. Slutsky regarding the extent of permanent impairment of

---

<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> See *infra* note 12.

appellant's lower extremities. It referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding his permanent impairment.

In a November 4, 2015 report, Dr. Wehner discussed appellant's factual and medical history and detailed the findings of the physical examination she conducted on that date. She noted that she was evaluating the permanent impairment of appellant's lower extremities by using Table 16-12 (Peripheral Nerve Impairment) beginning on page 534 of the sixth edition of the A.M.A., *Guides*. Dr. Wehner indicated that she did not find that appellant had a specific sensory or motor deficit in a specific nerve distribution as his reported pain was not in any specific nerve distribution. Appellant complained of circumferential numbness and tingling and pain down both legs, but this pattern was nonanatomic in nature. Dr. Wehner indicated that appellant exhibited self-limited behaviors on flexion/extension and heel and toe walking, as well as his subjective complaints with Waddell testing and therefore his subjective complaints were not verifiable. She also noted that a January 16, 2013 electromyogram (EMG) testing of the lower extremities revealed normal results. Dr. Wehner concluded that appellant had zero percent permanent impairment of his lower extremities at the present time.

In January 2016, OWCP referred appellant's case to a different OWCP medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon. It requested that Dr. Berman review the medical evidence of record, including Dr. Wehner's November 4, 2015 report, and provide an opinion on appellant's permanent impairment.

In a January 29, 2016 report, Dr. Berman indicated that he had reviewed Dr. Wehner's November 4, 2015 report, but noted that she used the improper standards when she used Table 16-12 on the sixth edition of the A.M.A., *Guides* without applying the standards of *The Guides Newsletter*. He determined that appellant had three percent permanent impairment of each lower extremity by applying the standards of *The Guides Newsletter*. Dr. Berman noted that he had mild sensory/pain deficit with a grade C default value of one percent permanent impairment for the left and right L4 nerve roots, mild sensory/pain deficits with a grade C default value of one percent for the left and right L5 nerve roots, and mild sensory/pain deficits with a grade C default value of one percent for the left and right S1 nerve roots.<sup>5</sup> He found that appellant reached maximum medical improvement (MMI) by November 4, 2015, the date of Dr. Wehner's examination.

On April 28, 2016 OWCP provided Dr. Wehner with a copy of Dr. Berman's January 29, 2016 report and afforded her 30 days to submit an impairment evaluation using *The Guides Newsletter*. In a May 18, 2016 report, Dr. Wehner continued to opine that appellant had zero percent permanent impairment of his lower extremities.

On May 25, 2016 OWCP forwarded Dr. Wehner's May 18, 2016 report to Dr. Berman for review and response. In his June 1, 2016 report, Dr. Berman opined that both Dr. Ellis and Dr. Wehner have misapplied the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He essentially repeated the evaluation he provided in his January 29, 2016 report and continued to opine that appellant had three percent permanent impairment of each lower extremity.

---

<sup>5</sup> Dr. Berman further found that there was no adjustment from these default values.

By decision dated September 30, 2016, OWCP determined that appellant did not have more than 34 percent permanent impairment of each lower extremity, for which he previously received schedule awards. It discussed Dr. Berman's January 29 and June 1, 2016 impairment ratings, finding three percent permanent impairment of each lower extremity, and indicated that his opinion constituted the weight of the medical opinion evidence. Therefore, the current medical evidence of record did not show that appellant had more than 34 percent permanent impairment of each lower extremity.<sup>6</sup>

### **LEGAL PRECEDENT**

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>7</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>8</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>9</sup>

Neither FECA nor the 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.<sup>10</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>11</sup> The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.<sup>12</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper

---

<sup>6</sup> OWCP indicated that a separate decision finding an overpayment of compensation would be issued. However, it did not issue a preliminary overpayment determination or final overpayment decision prior to appellant's filing of the present appeal. Therefore, the present appeal does not concern an overpayment issue. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

<sup>7</sup> 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of a leg an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2). With respect to a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. *Id.* at § 8107(c)(1).

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>10</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>11</sup> *Supra* note 9 at Chapter 2.808.5c(3).

<sup>12</sup> The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 34 percent permanent impairment of each lower extremity, for which he previously received schedule awards.

OWCP accepted that appellant sustained an occupational disease in the form of aggravation of degenerative lumbar disc disease due to walking, lifting heavy mail, and carrying a heavy mail bag at work. Appellant received schedule awards which compensated him for a total permanent impairment of each lower extremity of 34 percent. By decision dated September 30, 2016, OWCP determined that appellant did not have more than 34 percent permanent impairment of each lower extremity. It discussed the January 29 and June 1, 2016 impairment ratings of Dr. Berman, an OWCP medical adviser, which calculated three percent permanent impairment of each lower extremity. OWCP determined that Dr. Berman's opinion constituted the weight of the medical opinion evidence regarding appellant's permanent impairment.

The Board finds that OWCP properly afforded the weight of the medical opinion evidence to Dr. Berman's January 29 and June 1, 2016 impairment rating reports. Dr. Berman properly applied the standards of *The Guides Newsletter* to find that appellant had three percent permanent impairment of each lower extremity.<sup>14</sup> He correctly found that Dr. Wehner, the impartial medical specialist, used improper standards when she applied Table 16-12 of the sixth edition of the A.M.A., *Guides* without applying the standards of *The Guides Newsletter*.<sup>15</sup> In his January 29 and June 1, 2016 impairment rating reports, Dr. Berman noted that appellant had mild sensory/pain deficit with a grade C default value of one percent permanent impairment for the left and right L4 nerve roots; mild sensory/pain deficits with a grade C default value of one percent for the left and right L5 nerve roots; and mild sensory/pain deficits with a grade C default value of one percent for the left and right S1 nerve roots.<sup>16</sup> He found that appellant reached MMI by November 4, 2015, the date of Dr. Wehner's examination.

For these reasons, OWCP properly determined in its September 30, 2016 decision that appellant did not present evidence showing that he had more than 34 percent permanent impairment of each lower extremity, for which he previously received schedule awards.

---

<sup>13</sup> See *supra* note 9 at Chapter 3.700, Exhibit 4.

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8k (September 2010), which provides in pertinent part: "If a case has been referred for a referee evaluation to resolve the issue of permanent impairment, it is appropriate for the [District Medical Adviser] to review the calculations to ensure the referee physician appropriately used the [A.M.A., *Guides*]."

<sup>15</sup> See *supra* notes 10 through 13.

<sup>16</sup> Dr. Berman further found that there was no adjustment from these default values.

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 met his burden of proof to establish more than 34 percent permanent impairment of each lower extremity, for which he previously received schedule awards.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 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