United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 17-1846**
	)	**Issued: March 27, 2018**
DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE, San Juan, PR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2017 appellant filed a timely appeal from a June 21, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish lower extremity permanent impairment due to his accepted employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 28, 2007 appellant, then a 53-year-old senior service representative, filed an occupational disease claim (Form CA-2) alleging that he developed a low back injury while organizing and searching for documents.[3] He claimed that he reinjured his back bending at work. Appellant noted that he initially injured his back in 1995 and that this claim was accepted as well as a subsequent recurrence in 1999. OWCP accepted his claim for lumbar sprain on December 10, 2007. It expanded the claim to include acceptance of severe generalized anxiety disorder with depressive features on June 24, 2010.

Appellant filed a claim for a schedule award (Form CA-7) on December 16, 2009.

By decision dated September 22, 2011, OWCP denied his schedule award claim, finding that he had not submitted sufficient evidence to establish permanent impairment of a scheduled member. Appellant requested a review of the written record from OWCP's Branch of Hearings and Review on October 11, 2011.

By decision dated December 9, 2011, OWCP's hearing representative set aside the September 22, 2011 decision and remanded the case for OWCP to undertake further development and refer appellant for a second opinion evaluation to determine his permanent impairment.

OWCP referred appellant for a second opinion examination with Dr. Olga Rios, a Board-certified neurologist.

By decision dated April 6, 2012, OWCP denied appellant's claim for a schedule award finding that Dr. Rios was unable to provide an accurate description of impairment. Appellant subsequently appealed to the Board. In a January 7, 2013 decision,[4] the Board set aside the April 6, 2012 decision as OWCP did not refer Dr. Rios' report to an OWCP medical adviser in keeping with its procedures.

On February 21, 2013 OWCP's medical adviser reviewed Dr. Rios' report and found that her impairment rating was not based on reliable findings. He recommended an additional second opinion evaluation.

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[2] Docket No. 12-1328 (issued January 7, 2013).

[3] Appellant had several prior claims with OWCP including a November 20, 1993 claim accepted for right ankle fracture. He filed claims for traumatic back injuries on October 4, 1995 and September 2, 1999. OWCP accepted the September 2, 1999 injury for low back strain; OWCP File No. xxxxxx273. On December 1, 1997 appellant injured his left big toe while walking up the stairs at the employing establishment which OWCP accepted for a contusion, OWCP File No. xxxxxx739. OWCP accepted that he sustained a left ankle fracture on November 29, 2002; OWCP File No. xxxxxx904.

[4] *Supra* note 2.

By decision dated March 11, 2013, OWCP again denied appellant's schedule award claim. Appellant requested a review of the written record and in a June 5, 2013 decision, OWCP's hearing representative set aside the March 11, 2013 decision and remanded the case for OWCP to refer appellant for a supplemental report from Dr. Rios.

In a December 4, 2013 supplemental report, Dr. Rios noted that, when she examined appellant in 2012, he exaggerated motor weakness and in her opinion was enhancing his symptoms such that she could not make a proper assessment of his functional status. She found that appellant had strength of 4/5 in the right leg and -4/5 in the left leg with no atrophy. Dr. Rios performed a sensory examination and reported no clear deficit to pinprick, light touch, or vibration. Appellant's gait was stiff, he used a cane, and he was unable to tandem, heel, or toe walk, but that did not have Romberg's sign. Dr. Rios diagnosed diffuse degenerative disc disease of the lumbar spine and L4-5 radiculopathy on the left. She found that this examination was more reliable, and that appellant had radiculopathy in the L4-5 region on the left side with diminished strength in both legs. Dr. Rios concluded that her examination supported that he had degenerative disease of the lumbar spine with clear evidence of L4-5 radiculopathy consistent with his work-related injury. She noted that appellant's current examination did not support sensory deficit. Dr. Rios applied the spinal nerve impairment provisions of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] and found that he had 9 percent permanent impairment of L3, 11 percent permanent impairment of L4, and 9 percent permanent impairment of L5.

OWCP's medical examiner reviewed Dr. Rios' report on March 4, 2014 and found that her permanent impairment rating was of "no value" as there was no medical evidence supporting her conclusions. He recommended a new second opinion evaluation.

On April 9, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Christian Schenk, a Board-certified neurologist. In a report dated April 24, 2014, Dr. Schenk provided history of injury and reviewed the statement of accepted facts (SOAF). He reviewed appellant's lumbar magnetic resonance imaging (MRI) scan and found degenerative disc disease with mild bulging at L2-3 and L3-4. On physical examination Dr. Schenk reported low back tenderness to touch, but no muscle atrophy or muscle spasms. He determined that muscle tone was normal, that muscle testing was unreliable with poor effort. Dr. Schenk found that sensory examination was patchy, and inconsistent. It lacked a dermatomal or peripheral pattern of sensory deficits throughout the extremities, trunk, and face. Dr. Schenk noted that appellant's sensation and strength findings were exaggerated by appellant and clearly demonstrated by entraining, distraction, and maneuvers. He concluded that appellant did not have a neurologic or structural lesion and that his examination was contaminated by symptom enhancement and nonphysiological exaggeration. Dr. Schenk found no permanent impairment of the lower extremities.

OWCP's medical adviser reviewed Dr. Schenk's report on May 13, 2014 and found no permanent impairment of appellant's legs warranting a schedule award.

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

In a May 27, 2014 decision, OWCP denied appellant's claim for a schedule award. On June 19, 2014 appellant requested a review of the written record.

On August 7, 2014 appellant underwent electromyogram (EMG) studies and nerve conduction velocity (NCV) studies which demonstrated peripheral neuropathy and chronic L5-S1 right nerve root irritation or radiculopathy.

By decision dated February 23, 2015, a hearing representative set aside the May 27, 2014 decision and remanded the case for additional evaluation by Dr. Schenk[6] to determine whether appellant had any residuals of his accepted lumbar sprain and if so, whether appellant had permanent impairment to either lower extremity as a result of his accepted condition.

On April 21, 2015 OWCP referred appellant and a SOAF to Dr. David Ross, a Board-certified neurologist, for a second opinion evaluation. On May 5, 2015 Dr. Ross reviewed the SOAF and listed appellant's low back symptoms. On examination he found that appellant's lumbosacral spine showed severely decreased range of motion with significant patient guarding. Appellant had mild paravertebral muscle tenderness and spasm. Dr. Ross found normal motor tone without atrophy. Appellant's deep tendon reflexes were symmetric and normal, but he exhibited give-way weakness bilaterally involving all muscle groups. Sensory examination revealed decreased to absent vibration in the toes, loss of sensation on the bottom of the left big toe, in a nondermatomal pattern, mildly decreased pinprick in the right medial calf, sections of the foot, and in the left foot. Dr. Ross diagnosed nonspecific chronic low back pain. While appellant had degenerative changes on lumbar MRI scan, these changes did not correlate with his low back pain. His NCV and EMG findings also did not correspond to his symptoms. Dr. Ross reported that appellant "may have" mild cervical and lumbar tenderness, but his examination was tainted by severe symptoms magnification and excessive guarding. He further opined that appellant's mild myofascial spasm involving the neck and back "may be" related to his September 2007 work injury, but that there were no objective findings of neurological dysfunction. Dr. Ross again noted that appellant's give-way weakness was due to effort-related issues and subjective, nonphysiological sensory defects. He determined that appellant had no consistent, reliable, sensory, or motor findings and did not have ratable lower extremity impairment under the A.M.A., *Guides.* Dr. Ross found that appellant had reached MMI. He noted that he did not have appellant's complete medical records.

By decision dated June 19, 2015, OWCP denied appellant's claim for a schedule award, finding that, based on Dr. Ross' report, appellant had no permanent impairment of his lower extremities warranting a schedule award.

Appellant requested an oral hearing on July 7, 2015. In a January 12, 2016 decision, a hearing representative directed OWCP to secure a supplemental opinion from Dr. Ross based on appellant's complete medical records and refer his report to an OWCP medical adviser to determine any impairment for schedule award purposes.

[6] The record indicates that Dr. Schenk refused OWCP's request for an additional evaluation of appellant on March 31, 2015.

On May 25, 2016 OWCP referred appellant, a new SOAF, and supplementary questions for an additional examination by Dr. Ross. In his June 6, 2016 report, Dr. Ross noted the SOAF and reviewed appellant's medical history. He noted appellant's reports of back pain radiating down the right leg into the calf and foot. Appellant related symptoms of tingling down in the right leg and foot in a nondescript pattern. He found decreased range of motion in the cervical and lumbar spines with severe guarding and pain behavior. Dr. Ross also found mild paravertebral muscle tenderness and spasm. Motor examination showed normal tone and bulk. While he noted that appellant's strength was minimally reduced in the lower extremities, Dr. Ross concluded that these findings were unreliable due to complaints of pain and weakness that tainted effort. Reflexes were symmetric and normal. Appellant's sensory examination was nonphysiologic with patchy distributions of pin-prick and temperature loss in mostly the right leg which did not conform to any dermatomal pattern. Dr. Ross suggested that appellant's findings were possibly the result of generalized neuropathy. He diagnosed chronic pain syndrome. Dr. Ross opined that appellant had chronic low back muscle tenderness and spasm related to his September 27, 2007 work injury. He again noted that appellant's examination was tainted by a severe functional overlay evidenced by multiple nonphysiologic findings. Dr. Ross reported that appellant's neurological examination of the lower extremities remained inconsistent and nonphysiologic. He opined that, "There are no definite abnormalities on which to base impairment to the lower extremities." Dr. Ross reviewed appellant's EMG and NCV study and found that peripheral neuropathy was not related to the 2007 employment injury. He further found that the acute paraspinal muscle EMG findings were likely recent and not related to the 2007 employment injury.

OWCP again requested a supplemental report from Dr. Ross on October 13, 2016. On November 6, 2016 Dr. Ross opined that appellant expressed exaggerated chronic pain complaints. He noted that appellant's examination showed many nonphysiologic problems including maladaptive behaviors, give-way weakness, and exaggerated emotional responses that had no physical or sensory explanation. Dr. Ross concluded that appellant did not have a work-related physical impairment involving his lower extremities.

On November 29, 2016 OWCP's medical adviser reviewed the claim and concluded that appellant had no spinal impairments resulting in permanent impairment of the lower extremities and therefore his accepted conditions did not warrant a schedule award.

By decision dated December 19, 2016, OWCP denied appellant's schedule award claim. On January 18, 2017 appellant requested a review of the written record. He contended that Dr. Rios' reports were rejected due to bias, and that she should have been given an opportunity to correct the defects in her reports. Appellant further contended that the examinations from Drs. Ross and Schenk should be discounted.

In a June 21, 2017 decision, OWCP's hearing representative found that appellant had not met his burden of proof to establish that his accepted lumbar spine condition resulted in permanent impairment of his lower extremities entitling him to a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[9]

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.[10] Because neither FECA nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of whole person or the back or spine,[11] no claimant is entitled to such an award.[12]

Amendments to FECA, however, 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. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[13]

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.[14] OWCP has adopted this approach for rating impairment of the upper or

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[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 1 (January 2010).

[10] *W.D.*, Docket No. 10-0274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

[11] FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[12] *W.D., supra* note 10. *Timothy J. McGuire*, 34 ECAB 189 (1982).

[13] *W.D., supra* note 10. *Rozella L. Skinner*, 37 ECAB 398 (1986).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(c)(3) (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (January 2010).

lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in a July/August 2009, *The Guides Newsletter*.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish lower extremity permanent impairment due to his accepted employment injury.

OWCP accepted appellant's claim for lumbar sprain and severe generalized anxiety disorder with depressive features. Appellant filed a claim for a schedule (Form CA-7) and OWCP determined that he has not met his burden of proof to establish permanent impairment of his lower extremities due to his accepted employment injury.

Following the Board's January 7, 2013 decision, OWCP further developed appellant's schedule award claim. It complied with the Board's directive and referred Dr. Rios' report to an OWCP medical adviser. He found that her report was based on subjective complaints and indicated that appellant had symptom magnification such that this report was not a basis for a schedule award.[16]

OWCP requested a supplemental report from Dr. Rios, and on December 4, 2013, Dr. Rios provided appellant's permanent impairment as it related to his spine. Under FECA, a schedule award is not payable for injury to the spine.[17] Furthermore, this report did not provide an assessment of appellant's permanent impairment, pursuant to *The Guides Newsletter*, establishing ratable permanent impairment of a scheduled body member.[18] As such this report is of limited probative value in establishing appellant's entitlement to a schedule award.[19]

OWCP then referred appellant for a second opinion evaluation with Dr. Schenk. In his April 24, 2014 report, Dr. Schenk found that appellant did not have a neurologic or structural lesion and that his examination was contaminated by symptom enhancement and nonphysiological exaggeration. He concluded that appellant had no permanent impairment of the lower extremities. This report does not support appellant's claim for permanent impairment of the lower extremities

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibits 1, 4 (January 2010).

[16] OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment and to verify the calculations of the attending physician or second opinion examiner in accordance with the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, at Chapter 2.808.6(f)(1) (March 2017).

[17] *I.S.*, Docket No. 17-1257 (issued December 21, 2017).

[18] *T.D.*, Docket No. 17-1495 (issued January 4, 2018).

[19] *Id.*

as a result of his accepted spine conditions and does not establish permanent impairment of the lower extremities warranting a schedule award.[20]

OWCP then referred appellant to Dr. Ross to evaluate whether his accepted lumbar spine condition resulted in permanent impairment of his legs. Dr. Ross found that appellant's examination was tainted by a severe functional overlay evidenced by multiple nonphysiologic findings. He also noted that appellant's neurological examination of the lower extremities remained inconsistent and nonphysiologic. Dr. Ross determined that appellant had no consistent, reliable, sensory, or motor findings and did not have ratable lower extremity impairment under the A.M.A., *Guides.* The Board finds that as Dr. Ross opined that appellant did not have documented neurologic deficits that appellant was not entitled to any permanent impairment rating based on the sixth edition of the A.M.A., *Guides*.[21] There is no current medical evidence of record supporting that appellant has ratable permanent impairment of a scheduled body member under the A.M.A., *Guides,* or *The Guides Newsletter*.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish lower extremity permanent impairment due to his accepted employment injury.

[20] *Id.*

[21] *B.C.*, Docket No. 17-1617 (issued January 8, 2018); *D.K.*, Docket No. 15-1312 (issued October 6, 2015) (a finding of no sensory or motor deficits in the lower extremities results in zero percent impairment for the legs as a result of spine injury pursuant to the A.M.A., *Guides*).

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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