

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

C.S., Appellant)	
)	
and)	Docket No. 18-0394
)	Issued: August 15, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Wood River, IL, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 18, 2017 appellant filed a timely appeal from a December 11, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than four percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

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

Appellant, then a 61-year-old former customer service supervisor, filed an occupational disease claim (Form CA-2) which was accepted for lumbar sprain.⁴ He had previously undergone a left, L5-S1 microdiscectomy.⁵

On April 20, 2010 OWCP granted appellant a schedule award for four percent permanent impairment of his left lower extremity and zero permanent impairment of his right lower extremity pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

Appellant subsequently exercised her appeal rights multiple times, including appeals with the Board. By decisions and orders dated November 26, 2012⁷ and January 17, 2013,⁸ the Board found that the medical reports by OWCP's referral physicians were of diminished probative value and remanded appellant's case for further development of the medical evidence. By decision dated August 17, 2017, the Board determined that a March 26, 2015 report of Dr. Richard Katz, an OWCP second opinion examiner and Board-certified in physical medicine and rehabilitation, was of diminished probative value. It therefore remanded the case to OWCP for a supplemental report from Dr. Katz.⁹

On September 5, 2017 OWCP requested that Dr. Katz provide a rationalized opinion on whether appellant had additional permanent impairment of his bilateral lower extremities due to

³ Docket No. 11-0198 (issued August 3, 2011); *Order Remanding Case*, Docket No. 12-1279 (issued November 26, 2012); Docket No. 13-0600 (issued July 26, 2013); and Docket No. 16-1585 (issued August 17, 2017).

⁴ Appellant retired in 2013.

⁵ The February 20, 2008 surgical procedure was performed by Dr. Randall Rogalsky, a Board-certified orthopedic surgeon.

⁶ A.M.A., *Guides* (5th ed. 2001).

⁷ Docket No. 12-1279 (issued November 26, 2012).

⁸ Docket No. 13-0600 (issued July 26, 2013).

⁹ Docket No. 16-1585 (issued August 17, 2017).

his accepted lumbar sprain according to the sixth edition of the A.M.A., *Guides*¹⁰ and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

In a November 1, 2017 report, Dr. Katz discussed appellant's history of injury and noted that his claim was accepted for lumbar sprain. He reported additional diagnoses of chronic lumbar degeneration, radiculopathy, ongoing mechanical back pain, and lumbar stenosis. Dr. Katz related appellant's complaints of ongoing low back pain and left lower extremity radicular pain. Upon physical examination of appellant's lumbar spine, he observed superficial palpation lateral to the spine or axial compression and reduced range of motion in flexion, extension, lateral flexion, and rotation. Straight leg raise testing, Thomas test, and femoral stretch tests were negative. Dr. Katz indicated that sensory examination was notable for slight numbness/tingling in the left lateral three toes. He reported that chart review, history, and physical examination were consistent with largely resolved left lumbar S1 radiculopathy, mild residual reflux change, low back pain, and left-sided foot numbness. Regarding appellant's initial schedule award claim, Dr. Katz related that appellant did not have any additional neurological impairment, work related or otherwise. He referenced the July/August 2009 edition of *The Guides Newsletter* and indicated that the rating for S1 radiculopathy revealed a rating of four percent permanent impairment for "severe sensory deficit." Dr. Katz noted that appellant had no motor deficits.

In a November 24, 2017 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon and a DMA, reviewed appellant's claim and noted that he agreed with Dr. Katz's findings in his November 1, 2017 report that appellant had no new clinical findings to warrant additional permanent impairment of the left lower extremity. He referenced the sixth edition of the A.M.A., *Guides*, Table 16-1, page 495, and indicated that appellant had no new objective findings in his left leg. The DMA explained that because appellant's left leg numbness was old, he had class 0 impairment with zero percent impairment in the left lower extremity. He opined that appellant had no new or additional impairment greater than the four percent previously granted.

By decision dated December 11, 2017, OWCP found that appellant was not entitled to more than four percent permanent impairment of the left lower extremity. It determined that the weight of medical opinion rested with the March 26, 2015 and November 1, 2017 reports of Dr. Katz, the second opinion examiner, and the November 24, 2017 report of the DMA, who concluded that appellant was not entitled to an additional schedule award greater than the four percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA¹¹ and its implementing regulations¹² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

¹⁰ A.M.A., *Guides* (6th ed. 2009).

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404.

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. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.¹³ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁴

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.¹⁵ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁶ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.¹⁷ 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 and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.¹⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than four percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 14, 2016 decision because the Board has already considered this evidence in its August 27, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁹

Following the Board's most recent decision, OWCP referred appellant's claim to Dr. Katz, the second opinion examiner for a supplemental report. In a November 1, 2017 report, Dr. Katz referenced the July/August 2009 edition of *The Guides Newsletter* and indicated that the rating for S1 radiculopathy revealed a rating of four percent permanent impairment for "severe sensory

¹³ *Id.* at 10.404(a); *see also* *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

¹⁶ *Supra* note 14 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(3) (March 2017).

¹⁷ The methodology and applicable tables were initially published in *The Guides Newsletter*. *Id.*

¹⁸ *See supra* note 14 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁹ *See K.K.*, Docket No. 17-1061 (issued July 25, 2018). The Board will, therefore, not review the evidence addressed in the prior appeal.

deficit.” He noted that sensory examination was notable for slight numbness/tingling in the left lateral three toes. Dr. Katz explained that his chart review, history, and physical examination were consistent with largely resolved left lumbar S1 radiculopathy, mild residual reflux change, low back pain, and left-sided foot numbness. He noted that appellant had no motor deficits. Accordingly, Dr. Katz concluded that appellant had no additional permanent impairment of the left lower extremity according to the sixth edition of the A.M.A., *Guides*.

In a November 24, 2017 report, Dr. Ugokwe, a DMA, reviewed Dr. Katz’s November 1, 2017 report and agreed with his findings that appellant had no new clinical findings to warrant any additional impairment of the left lower extremity.

The Board has reviewed the opinion of Dr. Katz and finds that his November 1, 2017 report was sufficiently rationalized to establish that appellant had four percent permanent impairment of the left lower extremity. Dr. Katz’s opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*. He referenced *The Guides Newsletter* and provided medical rationale for his impairment rating. The DMA, upon his review of the record, agreed with Dr. Katz’s findings. Accordingly, the Board finds that OWCP properly relied on the reports of Dr. Katz and the DMA to find that appellant had not established more than four percent permanent impairment of the left lower extremity due to his accepted lumbar injury.²⁰ As appellant has not provided a rationalized medical opinion establishing greater impairment the Board finds that he has not established more than four percent permanent impairment of the left lower extremity due to his accepted lumbar injury.²¹

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 four percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

²⁰ See *D.B.*, Docket No. 17-0930 (issued July 11, 2018); *M.T.*, Docket No. 16-0296 (issued May 20, 2016).

²¹ When the treating physician does not provide a rating of impairment conforming to the proper edition of the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by the medical adviser. See *P.B.*, Docket No. 17-1046 (issued January 2, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2019
Washington, DC

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

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

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