United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 19-0373**
	)	**Issued: August 22, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Youngstown, OH, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 12, 2018 appellant, through counsel, filed a timely appeal from an October 26, 2018 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 the claim.[3]

[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 October 26, 2018 decision, OWCP received additional evidence. 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.*

ISSUES

The issues are: (1) whether appellant has established more permanent impairment of his left lower extremity, and more than three percent permanent impairment of his right lower extremity, for which he previously received a schedule award; and (2) whether he has met his burden of proof to establish a date of maximum medical improvement (MMI) prior to February 7, 2018.

FACTUAL HISTORY

On March 14, 2012 appellant, then a 49-year-old automotive technician, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2012 he was replacing a right rear tire while in the performance of duty. He felt pain in his lower back and legs when lifting the replacement tire onto the axle from a kneeling position. Appellant stopped work on March 14, 2012.[4] OWCP accepted the claim for lumbar sprain, herniated disc at L4-5 and L5-S1, spinal stenosis at L4-5 and L5-S1, and lumbar radiculopathy.

Appellant underwent OWCP-authorized microlaminectomy and microdiscectomy at L4-5 and L5-S1 on February 18, 2013, decompression laminectomy and fusion at L4-5 with decompression laminectomy at L5-S1 on December 2, 2013, and decompression laminectomy and fusion at the L5-S1 level with hardware removal at L4 on January 8, 2015. Appellant underwent hematoma irrigation and drainage on February 20, 2015. Appellant returned to full-time modified work as of August 5, 2015.

In a November 2, 2015 report, Dr. Jason Cerimele, a Board-certified internist and treating physician, indicated that appellant reached MMI. In a November 25, 2015 report, he related that appellant had normal findings in the lower extremities with regard to sensory and motor testing.

On January 26, 2016 Dr. Douglas H. Musser, an osteopathic orthopedic surgeon, reported that appellant had motor strength and sensation without deficit in the lower extremities.

On March 7, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated March 11, 2016, OWCP notified appellant that the evidence of record did not contain a medical report providing an opinion regarding the issue of permanent impairment. It instructed him to obtain a narrative medical report from a physician containing an evaluation of his permanent impairment, if any, with citation to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] OWCP afforded appellant 30 days to provide the necessary report. No response was received.

By decision dated April 29, 2016, OWCP found that appellant had not established permanent impairment of a scheduled member or function of the body in accordance with the A.M.A., *Guides.*

[4] Appellant returned to full-time limited duty on May 21, 2012, and stopped work for surgery on February 18, 2013.

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

Appellant, through counsel, requested a hearing before an OWCP hearing representative on May 9, 2016.

In a July 14, 2016 report, Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine, noted that appellant was seen on May 12, 2016. She related his history of injury, medical treatment, and physical examination findings. Referencing the A.M.A., *Guides*, Dr. Watkins Campbell indicated that appellant had moderate bilateral L5 sensory loss and mild motor loss. She opined that appellant had an 11 percent permanent impairment of the right lower extremity and 8 percent permanent impairment of the left lower extremity.

In a November 9, 2016, decision, OWCP's hearing representative explained that a preliminary review was completed and, as a result, she determined that the case was not in posture for a hearing. She explained that while the April 29, 2016 decision was correct based on the evidence of record at the time of the decision, OWCP subsequently received additional evidence. The hearing representative set aside the April 29, 2016 decision and directed that Dr. Watkins Campbell's report be referred to an OWCP district medical adviser (DMA) for further review.

On January 6, 2017 OWCP referred Dr. Watkins Campbell's report, a statement of accepted facts (SOAF), and appellant's medical record to Dr. Morley Slutsky, a Board-certified occupational medicine specialist, acting as an OWCP DMA, for an opinion as to whether appellant had sustained permanent impairment of the lower extremities.

In a January 11, 2017 report, Dr. Slutsky reviewed the SOAF and the medical evidence, including the report of Dr. Watkins Campbell. He noted that appellant's treating physicians had found normal lower extremity sensory and motor function along with normal testing on January 26, 2016, however, on May 12, 2016, less than four months later, Dr. Watkins Campbell found moderate bilateral L5 sensory loss and mild motor loss, but gave no reason as to why appellant's low back condition would have deteriorated since achieving MMI. Dr. Slutsky found that Dr. Watkins Campbell's clinical findings were inconsistent with the findings by other providers that appellant's sensory and motor testing were normal. He indicated that there was no basis for a lower extremity impairment rating in accordance with *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009).

By decision dated February 27, 2017, OWCP denied the claim for a schedule award based on the review by the DMA who found that Dr. Watkins Campbell's impairment rating was inconsistent with the other medical evidence of record.

On March 8, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held on September 14, 2017. Counsel argued that the DMA acted in an adjudicatory capacity when he dismissed Dr. Watkins Campbell's report and relied upon stale evidence. He also argued that referral for an impartial medical examination was warranted.

By decision dated November 27, 2017, an OWCP hearing representative vacated the February 27, 2017 decision and remanded the case to OWCP as further development was

warranted. She explained that as Dr. Watkins Campbell was the only physician who provided an impairment rating, a second opinion examination was warranted.

On December 11, 2017 OWCP referred appellant for a second opinion examination with Dr. William Bohl, a Board-certified orthopedist, to determine whether appellant's accepted lumbar conditions caused permanent impairment of a lower extremity.

In a February 7, 2018 report, Dr. Bohl noted appellant's history of injury, medical treatment, and physical examination findings, including his complaints of persistent numbness over the lateral right lower leg and dorsum of his foot. He determined that appellant reached maximum medical improvement as of the date of his examination. Dr. Bohl referred to *The Guides Newsletter*, Table 2, page 6, impairment class L5, and determined that appellant had no motor deficit, and therefore zero percent permanent impairment for motor loss. He explained that appellant had a persistent partial sensory loss over the right lateral calf and dorsum of his foot, placing him in deficit class 1 and that applying the functional history adjustment for the lower extremities in Table 16 of the A.M.A., *Guides*, the grade modifier was 0. Dr. Bohl indicated that appellant's functional adjustment on that side was however due to osteoarthritis of the right hip, rather than his accepted conditions. He noted the physical adjustment examination already accounted for the class assignment, and a clinical studies grade modifier of 1, for a final adjustment of -1, resulting in five percent permanent impairment the right lower extremity.

On March 12, 2018 Dr. Slutsky reviewed Dr. Bohl's second opinion evaluation. He outlined the criteria for each grade modifier, and then assigned the functional history grade modifier of 0, found physical examination grade modifier was irrelevant as neurologic findings were used to define impairment ranges, and assigned clinical studies grade modifier of 1. Dr. Slutsky calculated a net adjustment of -1, grade B, which correlated with 3 percent final right lower extremity permanent impairment. He explained that his rating differed from Dr. Bohl's because Dr. Bohl had rated appellant for a severe sensory loss, however he had only tested appellant for light touch, but did not test for sharp dull and protective sensibility to determine that his sensory deficits were more advanced than moderate findings. Dr. Slutsky also noted that Dr. Bohl documented no left lower extremity sensory or motor deficits related to spinal nerve roots and found no applicable left lower extremity impairment using *The Guides Newsletter*. He confirmed that the date of MMI was February 7, 2018, the date of Dr. Bohl's impairment evaluation.

By decision dated March 19, 2018, OWCP granted appellant a schedule award for three percent right lower extremity permanent impairment and zero percent left lower extremity permanent impairment based on the DMA's review of Dr. Bohl's findings. The date of MMI was established as February 7, 2018, the date of Dr. Bohl's examination. The period of the award was from February 7 to April 8, 2018, and the compensation rate was at the 66 2/3 percent non-augmented rate.

On March 28, 2018 appellant, through counsel, requested a hearing before an OWCP hearing representative which was held *via* teleconference on August 15, 2018. Appellant testified that his lower right leg was always numb, but he had no symptoms in his left lower extremity. Counsel disagreed with the date of MMI and argued that Dr. Watkins Campbell indicated that

MMI was in 2016. He objected to Dr. Slutsky's review, contending it was improper for him to find that another physician's evaluation was unreliable.

By decision dated October 26, 2018, an OWCP hearing representative affirmed the March 19, 2018 decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[6] and its implementing regulations[7] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

Neither FECA nor its implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine, or the body as a whole; a claimant is not entitled to such a schedule award.[10] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[11] 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.[12]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July/August 2009 *The Guides Newsletter*.[13] It was designed for situations in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal

[6] *Supra* note 2.

[7] 20 C.F.R. § 10.404.

[8] *Id*. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017).

[9] *Id.*; *R.A.*, Docket No. 19-0288 (issued July 12, 2019).

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

[11] 5 U.S.C. § 8101(9).

[12] *K.N.*, Docket No. 19-0165 (issued June 25, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018).

[13] The methodology and applicable tables were published in *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairments Using the Sixth Edition (July/August 2009).

nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[14] The Board has recognized the adoption of this methodology as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.[16]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established permanent impairment of the left lower extremity, however the case is not in posture for decision regarding the degree of appellant's permanent impairment of the right lower extremity.

Regarding appellant's left lower extremity, on November 2, 2015, Dr. Cerimele reported that appellant had reached MMI and had normal motor and sensory findings in the lower extremities. Appellant was seen on May 12, 2016, by Dr. Watkins Campbell, who opined that appellant had eight percent left lower extremity impairment. However, the DMA, Dr. Slutsky indicated that there was no rationale provided by Dr. Watkins Campbell to explain deterioration of appellant's accepted lumbar conditions, causing additional motor and sensory loss, after he reached MMI. The Board has previously explained that permanent impairment of a lower extremity must be explained in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment caused by the accepted conditions, with its resulting restrictions and limitations.[17] As Dr. Watkins Campbell did not explain why appellant's accepted conditions had deteriorated to cause permanent impairment, the DMA properly found that Dr. Watkins Campbell's clinical findings were inconsistent with the medical record and a second opinion was warranted.

In a February 7, 2018 report, Dr. Bohl noted appellant's current complaints which were limited to numbness of the right lower extremity. On March 12, 2018 the DMA, Dr. Slutsky, reviewed Dr. Bohl's second opinion evaluation and explained that appellant had no left lower extremity sensory or motor deficits related to spinal nerve roots and therefore no applicable impairment using *The Guides Newsletter*. Appellant also testified on August 15, 2018 that he had no symptoms in his left lower extremity. The Board finds that the DMA properly applied *The Guides Newsletter*, which requires sensory or motor loss of the lower extremity due to

[14] *See supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[15] *E.R.*, Docket No. 18-1646 (issued May 17, 2019); *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

[16] *L.S.*, Docket No. 19-0092 (issued June 12, 2019); *see supra* note 8 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

[17] *See K.N.*, *supra* note 12.

radiculopathy to establish permanent impairment of the lower extremity.[18] Appellant has therefore not established permanent impairment of his left lower extremity.

Regarding the right lower extremity, the Board finds that the case is not in posture for decision.

While second opinion physician Dr. Bohl rated appellant's right lower extremity for severe sensory loss and concluded that appellant had five percent permanent impairment of the right lower extremity, Dr. Slutsky, the DMA, related that Dr. Bohl had not conducted testing for sharp dull and protective sensibility to determine that his sensory deficits were more advanced than a moderate finding. He therefore concluded that appellant's right lower extremity permanent impairment could only be rated for a moderate sensory loss, and resulted in a permanent impairment of three percent.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[19] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[20] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[21] If the opinion is vague or incomplete, it is OWCP's responsibility to secure a supplemental report to correct the defect.[22] To obtain a complete report from Dr. Bohl, OWCP shall refer appellant for a supplemental examination in which he conducts light and deep sensory testing of appellant's right lower extremity and thereafter addresses whether appellant has a moderate or severe sensory loss. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.[23]

CONCLUSION

The Board finds that appellant has not established permanent impairment of his left lower extremity. The Board further finds that the case is not in posture for decision regarding the degree of permanent impairment of appellant's right lower extremity.

[18] *See supra* note 13.

[19] *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[20] *Id.*

[21] *T.C.*, Docket No. 17-1906 (issued May 25, 2018).

[22] *G.K.*, Docket No. 12-0058 (issued December 11, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9.c & j (June 2015) (a second opinion physician should provide a complete evaluation of the claimant's conditions. If the second opinion lacks rationale or fails to address the specific medical issues, OWCP should seek clarification from that physician).

[23] Given the disposition of Issue 1, Issue 2 is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 22, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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