

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

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| J.J., Appellant |) | |
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| and |) | Docket No. 19-0448 |
| |) | Issued: December 30, 2019 |
| U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, North Houston, TX, Employer |) | |
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On December 20, 2018 appellant filed a timely appeal from a November 29, 2018 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-0448.

OWCP accepted that on June 25, 2016 appellant, then a 63-year-old tractor trailer operator, sustained intervertebral disc displacement of the lumbar region and strain of muscle, fascia, and tendons in his lower back when he attempted to close a jammed trailer door while in the performance of duty.

On July 5, 2017 appellant filed a claim for a schedule award (Form CA-7). No additional evidence was received in support of his claim.

By decision dated October 3, 2017, OWCP denied his schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

OWCP subsequently received additional evidence. In a January 26, 2018 impairment rating report Dr. Robert Morrow, a chiropractor, found that pursuant to Chapter 17 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

(A.M.A., *Guides*)¹ appellant had 29 percent whole person impairment due to an intervertebral disc herniation.

In a July 11, 2018 medical report Dr. Steven B. Inbody, a Board-certified neurologist, determined that appellant had reached maximum medical improvement (MMI) on January 26, 2018. He opined that appellant had 40 percent permanent impairment of the lower extremity in accordance with the A.M.A., *Guides*. In a separate report dated July 11, 2018, received on July 20, 2018, Dr. Inbody provided an extensive evaluation and explanation of his 40 percent lower extremity impairment rating. He calculated permanent impairment of the right lower extremity amounting to 5 percent for the superficial peroneal nerve, 5 percent for the sural nerve, 15 percent for the common peroneal nerve, and 4 percent for the tibial nerve, totaling 29 percent permanent impairment. With respect to the left lower extremity, he calculated permanent impairment amounting to 15 percent for the common peroneal nerve and 4 percent for the tibial nerve, totaling 19 percent permanent impairment. Dr. Inbody provided detailed citations and page numbers for his calculations in accordance with *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*)² and the A.M.A., *Guides*. He also discussed findings for clinical studies, functional history, and physical examination and explained how he determined the impairment rating.

On July 20, 2018 OWCP routed the case file and the statement of accepted facts (SOAF) to Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). In a July 24, 2018 report, the DMA related that Dr. Inbody's July 11, 2018 evaluation included a rating of 40 percent lower extremity impairment, but he explained that Dr. Inbody had not indicated whether this impairment was for the right or left lower extremity. Dr. Harris determined that appellant had no neurologic deficit to either lower extremity consistent with lumbar radiculopathy, warranting zero percent permanent impairment. He concluded that appellant had zero percent permanent impairment of the bilateral lower extremities based on the methodology to rate spinal nerve impairments set forth in *The Guides Newsletter*.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Inbody, and its DMA, Dr. Harris, regarding permanent impairment of a scheduled member or function of the body. It then referred appellant to Dr. James E. Butler, a Board-certified orthopedic surgeon serving as an independent medical examiner (IME), to resolve the conflict. In his October 2, 2018 report, Dr. Butler determined that there was no objective evidence of neurologic deficits with intact sensation and motor strength throughout the lower extremities. Therefore, in accordance with *The Guides Newsletter*, he determined that appellant sustained zero percent permanent impairment to the bilateral lower extremities. Dr. Butler noted that MMI was reached on January 26, 2018, the date of Dr. Morrow's examination.

¹ A.M.A., *Guides* (6th ed. 2009).

² For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

By decision dated November 29, 2018, OWCP affirmed the October 3, 2017 decision finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

Having reviewed the case record submitted by OWCP, the Board finds that this case is not in posture for decision.³

The DMA, in his report regarding permanent impairment, indicated that Dr. Inbody's July 11, 2018 report was insufficient to establish permanent impairment as he failed to identify whether his impairment rating applied to the left or right lower extremity and also failed to provide citations to the A.M.A., *Guides* explaining his calculations. He did not acknowledge Dr. Inbody's supplemental report received by OWCP on July 20, 2018 or discuss the rationale and citations to the A.M.A., *Guides* set forth in the supplemental report. Following the finding of a conflict between Dr. Inbody and the DMA, appellant was examined by Dr. Butler who issued an IME report on October 2, 2018. Dr. Butler did not reference Dr. Inbody's supplemental rating report. The November 29, 2018 OWCP decision denying a schedule award, which accords the special weight to the IME Dr. Butler, only discusses the initial report of Dr. Inbody as it relates to the DMA's critique of its lack of citations and rationale.

The Federal Employees' Compensation Act⁴ provides that in deciding a claimant's entitlement to compensation benefits, OWCP is required by statute and regulations to make findings of fact⁵ after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.⁶ The Board has held that OWCP should make its decision on the basis of all the evidence of record at the time of the decision.⁷ A decision that rests on only part of the evidence will be set aside.⁸ In the case of *William A. Couch*,⁹ OWCP had not reviewed medical evidence received prior to the issuance of its final decision which denied the claim.

The Board finds that the November 29, 2018 decision failed to provide findings or references related to all of the medical evidence submitted from Dr. Inbody relating to the extent of appellant's permanent impairment. As such, it is determined that OWCP had not reviewed medical evidence received prior to the issuance of its final decision which denied the claim. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence

³ *T.Z.*, Docket No. 17-0679 (issued May 9, 2019).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons.

⁶ 5 U.S.C. § 8124(a). *See also Reyna M. Gonzalez*, Docket No. 03-1023 (issued June 17, 2003).

⁷ *D.G.*, Docket No. 17-0514 (issued May 4, 2018); *Jovita Weaver*, 2 ECAB 122 (1948).

⁸ *L.T.*, Docket No. 19-0145 (issued June 3, 2019); *Marshall G. Wright*, 2 ECAB 182 (1949).

⁹ 41 ECAB 548 (1990).

relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.¹⁰

Therefore, the Board will remand the case to OWCP. Upon remand it shall prepare an updated SOAF and refer the case file and all relevant reports, including all reports from Dr. Inbody, to a second opinion physician for a reasoned opinion regarding whether appellant sustained permanent impairment of a scheduled member or function of the body, warranting a schedule award. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹¹ Accordingly,

IT IS HEREBY ORDERED THAT the November 29, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this order of the Board.

Issued: December 30, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁰ See *S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004).

¹¹ *D.D.*, Docket No. 16-0558 (issued August 5, 2016).